IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1255

HARRY B. HELMSLEY, et al.,
Appellants,

vs.

THE BOROUGH OF FORT LEE, et al.,
Appellee,

AMERICANA ASSOCIATES, et al.,
Appellants,

vs.

THE BOROUGH OF FORT LEE, et al.,
Appellee,

NEW JERSEY REALTY COMPANY, et al.,
Appellants,

vs.

THE BOROUGH OF FORT LEE, et al.,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

JURISDICTIONAL STATEMENT

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IN THE

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OCTOBER TERM, 1978

No.

HARRY B. HELMSLEY, et al.,
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JURISDICTIONAL STATEMENT

PRELIMINARY STATEMENT

Appellants, *Harry B. Helmsley, et al., New Jersey Realty Co., et al.* and *Americana Associates, et al.*, appeal from so much of a final judgment of the Supreme Court of New Jersey on a consolidated appeal dated October 17, 1978 and the denial of rehearing dated November 14, 1978 holding that (1) rent control ordinances were validly enacted in the Borough of Fort Lee, New Jersey (Fort Lee); (2) the Municipal Rent Control Ordinance of Fort Lee (Ord. No. 74-32) which limits landlords to annual rent increases of not more than two and one-half percent (2½%) prior to January 1, 1977 and which limits landlords' annual rent increases to three-fourths (¾) of the Consumer Price Index (CPI) on and after January 1, 1977 was valid on its face and as applied; and (3) an amendment to the Ordinance (Ord. No. 76-8) which limits landlords to annual rent increases of less than 2% was valid. Appellants submit this Jurisdictional Statement to show that the United States Supreme Court has jurisdiction of this appeal and that substantial federal questions are presented.

OPINIONS BELOW

The Opinion of the Supreme Court of New Jersey, which appears in the Appendix hereto, p. 1a *infra* was rendered on October 17, 1978 and is reported at 78 N.J. 200, 394 A.2d 65 (1978). The denial of the Petitions for Rehearing submitted by both appellants and respondents below was dated November 14, 1978 and is reprinted in the Appendix at 84a and 85a *infra*.

The Opinion of the trial court in the matter of *Harry B. Helmsley, et al. v. Borough of Fort Lee, et al.* ("Helmsley") was rendered on June 30, 1975 and was not officially reported. Judgment was entered on July 31, 1975. The Appellate Division affirmed the trial court in a *per curiam* opinion dated March 31, 1977 which was not officially reported. The Supreme Court vacated the Appellate Division Judgment on July 21, 1977 and granted certification at 75 N.J. 31, 379 A.2d 261 (1977) which is reprinted in the Appendix at p. 46a *infra*.

The matter of *New Jersey Realty Co., et al. v. Borough of Fort Lee, et al.* was consolidated with *Americana Associates, et al. v. Borough of Fort Lee, et al.*, and the trial court rendered an oral unreported opinion on January 31, 1977. Judgment was entered on March 11, 1977. The consolidated appeal was pending in the Appellate Division when the New Jersey Supreme Court granted certification on July 21, 1977, 75 N.J. 31-32, 379 A.2d 262 (1977) which is reprinted in the Appendix at p. 47a *infra* and consolidated and remanded all three cases for a plenary hearing on the issue of just and reasonable return, at the same time retaining jurisdiction.

The Findings and Determinations of the trial court dated March 1, 1978 with respect to the issue of "just and reasonable return" on the remand by the Supreme Court to the Superior Court, Law Division, was not reported. It is reprinted in the Appendix at p. 48a, *infra*.

JURISDICTION

The Judgment of the Supreme Court of New Jersey upholding the validity of the Fort Lee Rent Control Ordinances was entered on October 17, 1978 (1a *infra*). A timely Motion for Rehearing was entertained and denied on November 14, 1978 (84a and 85a *infra*).

Timely Notice of Appeal was duly filed in the Supreme Court of New Jersey on February 2, 1979 (106a *infra*). This appeal is being docketed in this Court within 90 days from the denial of the rehearing below. *Department of Banking v. Pink*, 317 U.S. 264 (1942).

The jurisdiction of this appeal is conferred on this Court under 28 U.S.C. §1257(2) since the New Jersey Supreme Court upheld the validity of the municipal ordinances of the Borough of Fort Lee, New Jersey. *Erznoznick v. City of Jacksonville*, 422 U.S. 205, 207, n.3 (1975); *John P. King Mfg. Co. v. City Council of Augusta*, 277 U.S. 267 (1928).

In the event that the Court does not consider appeal the proper mode of review, appellants request that the papers whereupon this appeal is taken be regarded and acted upon as a Petition for Writ of Certiorari pursuant to 28 U.S.C. §2103.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Fourteenth Amendment, United States Constitution:

> [No State shall] . . . deprive any person of life, liberty or property, without due process of law . . ."

Fort Lee Municipal Ordinance No. 74-32:

This Ordinance was enacted effective November 6, 1974 and is set forth in its entirety in the Appendix at p. 86a *infra*. A crucial provision in the Ordinance was Section 2, which provided in part:

> Notwithstanding any of the foregoing provisions of this section to the contrary, no landlord may request or receive a percentage increase in rent with respect to any housing space which is greater than two and one-half (2½%) per cent of the last prior rent during any calendar year.

Fort Lee Municipal Ordinance No. 75-45:

This Ordinance was enacted effective July 31, 1975 and is set forth in its entirety in the Appendix at p. 97a *infra*.

Fort Lee Municipal Ordinance No. 76-8:

This Ordinance was enacted June 30, 1976 and is set forth in its entirety in the Appendix at 100a *infra*.

QUESTIONS PRESENTED

1. Whether the enactment of municipal rent control ordinances by the Borough of Fort Lee in the absence of either (1) a national emergency, (2) any emergency affecting the health, safety and welfare of the citizens of New Jersey or Fort Lee, or (3) any rational basis, is repugnant to the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

2. Whether the Fort Lee Rent Control Ordinance (No. 74-32 as amended) which limits landlords to annual increases in rent of not more than 2½% without a prompt, fair and efficacious hardship relief mechanism at a time when the Consumer Price Index increased at an average annual rate of 8% and landlords' operating costs increased at even higher rates and which caused economic losses to all property owners and adversely affected the public by causing the cessation of all apartment construction, financing and investment and the deterioration of existing housing is arbitrary, capricious and confiscatory on its face and as applied and is repugnant to the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

3. Whether the Fort Lee Rent Control Ordinance (No. 76-8) providing for a "Maximum Annual Percentage" formula which when computed limits annual increases in rent to less than 2% at a time when operating costs are increasing at substantially higher rates, without a prompt, fair and efficacious hardship relief mechanism is arbitrary, capricious and confiscatory on its face and as applied and is repugnant to the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

4. Whether the Fort Lee Rent Control Ordinances which deny landlords of rental property rent increases at least equal to the actual increases in operational costs incurred by landlords and which deny landlords a fair and reasonable return are arbitrary, capricious, confiscatory and repugnant to the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

STATEMENT OF THE CASE

This action is a challenge to the validity of the enactment of any rent control ordinance in Fort Lee. This action specifically challenges the validity and constitutionality of a rent control ordinance enacted in the Borough of Fort Lee (Ord. No. 74-32) in 1974 and amended in 1975 (Ord. 75-45) which provides *inter alia* that annual rent increases are limited to the percentage increase in the Consumer Price Index for a nine-month period provided that such increase shall not exceed 2½% "of the last prior rent during any calendar year." In light of the economic conditions which prevailed in the early 1970's and which continue to prevail, the practical effect of the ordinance was to limit annual rent increases to 2½%. In addition, this action challenges the validity of an amendment to that ordinance, Ord. No. 76-8, which, through a "Maximum Annual Percentage" (MAP) formula limits annual increases in rent to less than 2%.

Appellants raised the issue of the unconstitutionality of both Ord. No. 74-32 as amended and Ord. No. 76-8 as repugnant to the Due Process Clause of the Fourteenth Amendment in the Complaints initially filed in the trial court in each individual case and in the briefs on appeal. The trial court in *Helmsley, et al. v. Fort Lee,* held that a housing emergency existed which justified rent control, that 2½% rate was not invalid *per se,* and that since the plaintiffs failed to prove they had not received a "fair net return", the 2½% limitation was not unconstitutional as applied. The trial court in the consolidated cases of *New Jersey Realty Co., et al.* and *Americana Associates v. Fort Lee* did not consider the issue of constitutionality as applied of Ord. 76-8 holding that there was no exhaustion of administrative remedies.

After the Appellate Division affirmed the trial court in *Helmsley,* the New Jersey Supreme Court vacated the Appellate Division judgment and consolidated and remanded all three cases to the Superior Court, Law Division, for a plenary hearing on the issue of just and reasonable return with respect to Ord. No. 74-32 and Ord. No. 76-8 in light of *Hutton Park Gardens v. West Orange Town Council,* 68 N.J. 543, 350 A.2d 1 (1975), *Brunetti v. Borough of New Milford,* 68 N.J. 576, 350 A.2d 19 (1975) and *Troy Hills Village v. Parsippany-Troy Hills Tp. Council,* 68 N.J. 604, 350 A.2d 34 (1975) referred to collectively as the "Trilogy". The constitutional issue was described by the New Jersey Supreme Court in the case at bar at p. 2a to 3a *infra* with reference to the "Trilogy":

> "In [the Trilogy], we held that a rent control ordinance must permit an efficient landlord to realize a 'just and reasonable return.' *Hutton Park Gardens, supra,* 68 N.J. at 568; *Brunetti, supra,* 68 N.J. at 592; *Troy Hills Village, supra,* 68 N.J. at 620. On the present appeal, we are required to determine whether the application of the rent control ordinances of Fort Lee has or has not denied landlords this minimum constitutional return."

The "Trilogy" referred to by the Supreme Court held that a rent control ordinance may not be unconstitutionally confiscatory as described in *Hutton Park Gardens v. West Orange Town Council, supra,* 68 N.J. at 568, 350 A.2d at 14-15:

> "In ordinary circumstances, price controls which do not permit an economically efficient operator to obtain a 'just and reasonable' return on his investment are deemed confiscatory. FPC v. Texaco, Inc., supra; Permian Basin Area Rate Cases, supra 390 U.S. at 769-770, 88 S. Ct. at 1361-62, 20 L.Ed.2d at 337-338; FPC v. Natural Gas Pipeline Co., supra, 315 U.S. at 585-86, 62 S. Ct. at 742-43, 86 L.Ed. at 1049-50."

> "The requirement that rent regulation must permit a just and reasonable return does not place any undue restriction on the mechanism of regulation. The regulatory scheme need not take a particular predetermined form. So long as the means chosen to accomplish the object are not wholly arbitrary and unreasonable, the courts are concerned solely with the question of whether the return actually permitted is just and reasonable. Permian Basin Area Rate Cases, supra, 390 U.S. at 768-70, 88 S. Ct. at 1360-62, 20 L.Ed.2d at 336-38; FPC v. Hope Natural Gas Co., 320 U.S. 591, 602, 64 S. Ct. 281, 287, 88 L.Ed.2d 333, 334 (1944); see FPC v. Texaco, supra, 417 U.S. at 391-92; 94 S. Ct. at 2323-24, 41 L.Ed.2d at 152-53; Wisconsin v. FPC, 373 U.S. 294, 309, 83 S. Ct. 1266, 1274, 10 L.Ed.2d 357, 368 (1963)."

Likewise, the *Troy Hills Village v. Parsippany-Troy Hills Tp. Council* case, 68 N.J. at 620, 350 A.2d at 42 held:

> "Although the subsidization of housing may be deemed a desirable or necessary response to social or economic ills, landlords cannot be compelled by municipal ordinances to subsidize the housing needs of their tenants. The legislative power to set rates does not give a municipality 'power to compel the doing of services without reward . . .' Budd v. New York, 143 U.S. 517 . . . As discussed in Hutton Park, supra, 68 N.J. at 565, a rent control regulation to survive a constitutional challenge must be non-confiscatory as applied as well as non-confiscatory on its face. The test for confiscation is whether the ordinance permits an efficient landlord to obtain a 'just and reasonable' return on his property. Hutton Park, supra, 68 N.J. at 568-70."

The New Jersey Supreme Court in the case at bar concluded at 19a *infra:*

> "Although plaintiffs failed to prove that the 2.5% ordinance had a confiscatory effect before December 31, 1976, their proofs demonstrate that the foreseeable impact of the 2.5% limitation after 1976 will be widespread confiscation."

Ord. No. 74-32 limited annual rent increases to 2½% and also provided a hardship relief mechanism ostensibly designed to grant relief to individual landlords from any hardship caused by rent control. Instead, the "relief mechanism" caused inordinate expense and regulatory delays, and provided vague standards and arbitrary methods of computing just and reasonable return.

As a direct result of this restrictive rent control scheme, all residential apartment construction in Fort Lee ceased. Mortgage financing became unavailable, and owners were unable to sell their properties. A number of apartment projects have become insolvent and are in receivership. The Department of Housing and Urban Development (HUD) pre-empted local rent control from other buildings under 24 C.F.R. §403 which authorizes such preemption on a building with a federally insured mortgage if the local rent regulation "jeopardizes the Department's interest in the project." Still other landlords were required to seek a moratorium on mortgage payments from mortgage lenders. Landlords have suffered a severe decline in income in light of the drastic increase in operational expenses and an increase in the Consumer Price Index of 48% between 1970 and 1976. Valuation of apartment properties in Fort Lee declined substantially threatening the tax base of the municipality. Finally, despite management efficiencies, there has been a continued deterioration of the housing stock in the municipality to the detriment of the tenants for whose benefit rent control was purportedly enacted.

These restrictive rent control ordinances were enacted by a Borough Council dominated by apartment

dwellers. Fort Lee is an affluent middle or upper-class suburb of New York City located adjacent to the George Washington Bridge. It has a population of 33,000 located on only 2.5 square miles which primarily commutes to professional or white-collar jobs in New York City or New York State. The median family income in 1970 was $25,000, or nearly double the national median family income. A substantial number of the apartments are of luxury class with amenities such as private swimming pools, reserved parking and 24-hour security in modern, well-appointed structures. Vacancy rates prior to the 1974 ordinance ran in the range of 5% although the annual turnover of tenants was 20%-30%. Fort Lee tenants, thus, are both affluent and extremely mobile.

Rent control and its 2½% limitation proved a disaster to landlords, and the hardship mechanism proved illusory. A part-time "Rent Leveling Board" was guided by vague criteria set forth in the ordinance and without a professional staff. The Rent Leveling Board was empowered to grant hardship relief for only one year thus forcing landlords to return for additional relief in each successive year. Delays in obtaining hardship relief for many months or even over a year were not uncommon. The rent board chose to look back ten years to the financial records of some applicants. The administrative paper work was both time consuming and expensive, and a $1,500 fee for the Borough's accountant was demanded for each application. This inhibited many smaller apartment owners from seeking hardship relief initially. Finally, hardship relief was usually granted subsequent to the year for which hardship was sought thus rendering it difficult and burdensome to collect increased rentals for that hardship and forcing the landlord to seek additional relief in the next year. Thus

hampered by its own inadequate relief procedures and overburdened by the increasing number of landlords who required hardship relief because of the severe 2½% limitation on rental increases, the entire Fort Lee rent mechanism became unworkable. Instead of serving as a rarely used safety valve to relieve unusual financial pressures, the Rent Leveling Board was administering rents in an increasing fraction of Fort Lee's 10,000 rental units.

Rent control proved a financial disaster to landlords. High-rise apartments were hardest hit and between 1970 and 1976 experienced a decrease in net profit before debt service of over $1,500,000. However, when measured against the Consumer Price Index increase of 48% during the six years, the net loss to high-rise apartments was $3,500,000. In high-rise apartments, the operating expenses increased between 1973 and 1974 by 38.7%, in low-rise buildings, the operating expenses increased by 41.2%, and in garden apartments, the operating expenses increased by 23.5%. Yet in 1974, Fort Lee deemed a 2½% annual increase in rent sufficient by enacting Ord. No. 74-32.

As a direct result of the restrictive rent controls the market value of rental apartment properties declined substantially. In 1970 the combined value of the 22 multi-family properties then in existence in Fort Lee was $97,000,000; the same properties in 1976 had dropped in value to $66,000,000, a loss in value of $31,000,000.

As a further result of the decreasing valuations in property, the tax base of Fort Lee suffered a rapid decline, and the burden of taxation had begun to shift from multi-family apartments to homeowners of single-family dwellings. Future projections for the next 5 years indicate that

either taxes paid by homeowners or tax assessments would have to be drastically increased in order to preserve the present fiscal conditions and level of municipal services in Fort Lee.

The trial court on the remand considered the evidence and concluded *inter alia* that expenses were rapidly increasing far in excess of 2½% per annum (59a), that rents were reasonable (61a), that the 2½% increase is a token and the regulation tantamount to a rent freeze (62a), that hardship applications had become the rule rather than the exception (63a), that the hardship formula adopted by the Rent Leveling Board was arbitrary and capricious (68a), that the deviation below the Consumer Price Index was irrational, arbitrary and capricious (80a), and, finally, at 83a, *infra:*

> "The cumulative effect of the 2½% limitation, the tax surcharge repealer and the RLB hardship formula, applied to the fiscal facts adduced during the remand hearing, renders the entire Fort Lee rent control mechanism confiscatory and invalid. The CPI limitation remains in effect."

Plaintiff submits that it is significant that the trial judge on the remand, Judge Harvey Smith, had been the trial judge who earlier had sustained the validity of the 2½% limitation but in light of the overwhelming evidence presented on the remand reversed his position and determined the limitation to be unconstitutionally confiscatory, arbitrary and capricious.

The New Jersey Supreme Court held that the 2½% limitation on rent increases (Ord. No. 74-32) was not confiscatory prior to January 1, 1977 but was confiscatory and unconstitutional thereafter. The entire hardship relief

mechanism was held unworkable and unconstitutional. One provision of the new ordinance, Ord. No. 76-8, which was designed to repeal the "property tax passthrough" provision of Ord. No. 74-32 was held unconstitutional and is not an issue here. Another provision of the new rent ordinance limited rent increases to a "Maximum Annual Percentage" (MAP) formula and was upheld by the Court. The MAP formula ostensibly provides for a maximum rent increase of 5% for landlords who do not provide all utilities, and 6.5% for landlords who provide all utilities, but this formula as actually computed permits landlords an increase of only 1.9% and 2.9% respectively.

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

The federal questions before this Court are substantial, involve large numbers of landlords and tenants not only in Fort Lee but throughout the country, affect the general public and concern an issue, rent control, which has not been addressed by this Court since *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138 (1948). Further, this Court has never considered the minimum return below which a municipal rent control ordinance becomes confiscatory and unconstitutional.

In New Jersey, more than one hundred municipalities have enacted rent control ordinances. Rent regulation has been enacted by statute or ordinance in Alaska, California, Connecticut, District of Columbia, Florida, Maryland, Massachusetts and New York. This Court has considered and upheld the validity of early rent controls set up as *temporary* and *emergency* measures in the District of Columbia, *Block v. Hirsh*, 256 U.S. 135 (1921) and New York, *Marcus Brown Holding Co. v. Feldman*, 256 U.S. 170 (1921); *Edgar A. Levy Co. v. Siegel*, 258 U.S. 242 (1922), but further, holding that when such emergency ceases to exist, the validity of rent control also ceases, *Chastleton Corp. v. Sinclair*, 264 U.S. 543 (1924). Finally, rent controls arising from *war time emergency* were upheld in *Bowles v. Willingham*, 321 U.S. 503 (1944) and *Woods v. Cloyd W. Miller Co., supra.*

Appellants submit that in 1979, the Supreme Court must hold unconstitutional the Fort Lee municipal rent control ordinances in the absence of a national emergency, any emergnecy affecting the health, safety or welfare of the citizens of New Jersey or Fort Lee, or any rational basis, as being repugnant to the Due Process Clause of

the Fourteenth Amendment of the United States Constitution. Further, the ordinances limiting annual increases of rent to 2½% or less must be held confiscatory and unconstitutional.

A. *The enactment of rent control in Fort Lee in the absence of a national emergency, or a local emergency or rational reason was repugnant to the due process clause of the United States Constitution*

This Court has never conisdered the validity of any rent control legislation enacted in the absence of a national or local emergency, cf. *Bowles v. Willingham, supra, Block v. Hirsh, supra.* On the contrary, the Supreme Court has indicated that a drastic exercise of police powers to enact rent controls may be justified only as a temporary measure in *Block v. Hirsh, supra,* at 256 U.S. 157:

> "The regulation is put and justified only as a temporary measure . . . A limit in time, to tide over a passing trouble, well may justify a law that could not be upheld as a permanent change."

Where, however, the emergency ceases, the need for rent control ceases. *Chastleton Corp. v. Sinclair, supra.*

The Borough of Fort Lee has enacted the rent control ordinances as permanent peacetime legislation in the absence of any nationally declared emergency and at a time when fuel, labor and other building operating costs are not controlled either nationally or locally. The preamble of Ord. No. 74-32 is couched in terms of "emergency" which is at best a local housing shortage. Prior to 1974, the vacancy rate in Fort Lee was approximately 5%, which rate is subject to seasonal differences. More important is the annual turnover rate which is between 20%

and 30%. Thus, while at any moment in time only 5% of apartments are vacant, within one year, 20% to 30% of the apartments become available for a new tenant. Appellants submit that the "turnover rate" rather than the "vacancy rate" is a clear index of apartment availability. Utilizing either the vacancy rate or turnover rate, however, there is no housing shortage.

Further, there was no rent gouging, and rents in Fort Lee were reasonable, a fact found by the trial court on remand (61a). There was no basis for the enactment of rent control on the grounds of a national or a local emergency. Accordingly, the ordinances were repugnant to the Due Process Clause of the United States Constitution. *Block v. Hirsh, supra.*

Nor is there a rational reason for the exercise of the police power in the enactment of rent control. In *Nebbia v. New York*, 291 U.S. 502 (1934), the United States Supreme Court held at 539:

> "Price control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory or demonstrably irrelevant to the policy the legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty."

The enactment of rent controls at a time in which there was no national or local emergency, no housing shortage, where rents were reasonable, where most tenants were extremely affluent and mobile, was irrational, arbitrary and capricious, and constituted an unconstitutional interference with individual liberty.

B. *The 2½% limitation and the more restrictive "MAP" rental limitation, without a prompt, fair and efficacious hardship relief mechanism were arbitrary, capricious, confiscatory and repugnant to the due process clause of the United States Constitution*

The enactment of rent controls with less than a 2½% annual increase was arbitrary and unreasonable and without a rational basis. Fort Lee made no legislative findings on the necessity or extent of rent control, rather, 2½% was believed to be derived from Federal Phase II guidelines (6 CFR §301) in which all sectors of the economy were regulated. The specific proposal came from the local tenants' organization whose President declared to the Council: ". . . landlords are making excessive profits anyway and it's time to . . . bring things to a halt, and they wouldn't suffer with a 2½% increase." Not only did the political circumstances surrounding the enactment demonstrate that the 2½% limitation was arbitrary, but the existing economic conditions made the 2½% limitation irrational and totally unrelated to the rapidly spiraling operational costs of landlords which greatly exceeded 2½% annually. In 1974 alone, the CPI had increased in excess of 10%. The trial court on remand found as follows at 59a *infra*:

> "The impact of the 1973 Arabian Oil embargo affected the real estate apartment industry in 1974. Typically for that year, Med. I suffered *a 76.4% increase in utility costs* and *an overall 18% rise in its operating expenses.* Fort Lee's governing body determined that 2½% would adequately compensate landlords the very same year. Once these costs are leveled off, taxes skyrocketed. In 1976 Fort Lee real estate taxes increased 33% over the prior year and 50% over 1974. While *operating expenses rose 43% from 1973 to 1976,* the 2½% limitation on rental increases was made even more

> restrictive to landlords by enactment of the tax surcharge repealer. It is not reasonable to anticipate future increases of this magnitude but it is unrealistic to prognosticate annual operating cost increases of only 2½%. *All of the overwhelming and unrefuted evidence demonstrates that there was never a factual basis to justify imposition of the 2½% limitation.*" (Emphasis added)

It is manifest that the 2½% limitation had no conceivable relation to the health, welfare or safety of the citizens of Fort Lee or to the needs of tenants or landlords. *Nebbia v. New York, supra* at 539. It was patently arbitrary, irrational and repugnant to the Due Process Clause of the United States Constitution.

The 2½% ordinance is confiscatory on its face and as applied since it precludes all landlords in Fort Lee from obtaining a just and reasonable return. Not only an isolated landlord or the inefficient operator have suffered economic harm, *Hegeman Farms Corp. v. Baldwin*, 293 U.S. 163 (1934), but all Fort Lee landlords suffered losses. Cf. *Mora v. Mejias*, 223 F.2d 814 (1st Cir. 1955); *Kress, Dunlap & Lane, Ltd. v. Downing*, 193 F. Supp. 874 (D.V.I. 1961). The evidence compelled Judge Smith to find at 62a *infra*:

> "All this makes it abundantly clear that the automatic 2½% increase is merely a token and the regulation tantamount to a rent freeze."

This Court has stated that a total rent freeze may be justified in times of war in *Bowles v. Willingham, supra*, at 519:

> "We need not determine what constitutional limits there are to price fixing legislation. Congress was dealing here with conditions created by activities resulting from a great war effort. Yakus v. United States, supra. *A nation which can demand the lives of its men and women in the waging of that war is under no constitutional necessity of providing a system of price control on the domestic front which will assure each landlord a 'fair return' on his property.*" (Emphasis added)

Extremely restrictive rent control may also be valid as a temporary measure, *Block v. Hirsh, supra*, at 157. However, permanent and peacetime rent regulations as enacted in Fort Lee, which are unrelated to war or grave economic disturbance and which, at best, are related to a local housing shortage, do not justify a rent freeze and confiscation. Cf. *Bowles v. Willingham, supra; Hamilton v. Kentucky Distilleries & Warehouse Co.*, 251 U.S. 146 (1919); *Home Building & Loan Assn. v. Blaisdell*, 290 U.S. 398 (1934).

Landlords of rent-controlled properties are entitled to a just and reasonable return. *FPC v. Texaco, Inc.*, 417 U.S. 380, 392 (1974); *Permian Basin Area Rate Cases*, 390 U.S. 747, 769 (1968); *Denver Union Stock Yard Co. v. United States*, 304 U.S. 470, 475 (1938). Yet, the 2½% or even more restrictive limitation of MAP clearly deny landlords this constitutional minimum.

The hardship relief mechanism was ostensibly designed to afford relief from rent control in isolated cases, yet the exception became the rule (63a). The hardship relief mechanism suffered from inefficiencies, inequities and substantial delays and was held unconstitutional by the New Jersey Supreme Court below. See, *Smith v. Illinois Bell Tel. Co.*, 270 U.S. 587, 591 (1926). The New Jersey Supreme Court erred, however, in not holding the Fort Lee ordinances void in their entirety because of the defective hardship relief mechanism. Appellants submit that the unconstitutional hardship relief procedure in the Fort Lee Rent Control Ordinances render the Ordinances void

ab initio and repugnant to the Due Process Clause of the United States Constitution.

Landlords were forced to bypass the hardship relief mechanism and sought relief by federal pre-emption of rents from the Department of Housing and Urban Development (HUD) pursuant to 24 CFR §403, see *515 Assoc. v. City of Newark*, 242 F. Supp. 984 (D.N.J. 1977), by requesting a moratorium on mortgage payments from lenders, by insolvency and by seeking relief in the courts, of which the within action is a culmination of five years of court proceedings.

In *Stone v. Farmers Loan & Trust Co.*, 116 U.S. 307 (1887), the Supreme Court recognized that a state had the power to limit charges by railroad companies, but it cautioned at 331:

> ". . . it is not to be inferred that this power of limitation or regulation is itself not without limit. *This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation.* Under pretense of regulatory fares and freights, the state cannot require a railroad to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation or without due process of law." (Emphasis added)

The Borough of Fort Lee has abused its police power by enacting any rent control ordinance and specifically ordinances which limit annual rent increases to 2½% or less without a prompt, fair and efficacious hardship relief mechanism and which cause widespread economic harm to all landlords. Its power to regulate was indeed used as a power to destroy, and the rent control ordinances were accordingly void *ab initio* and repugnant to the Due Process Clause of the United States Constitution.

CONCLUSION

Probable jurisdiction should be noted as the federal questions presented are so substantial as to require plenary consideration with briefs on the merits and oral argument for their resolution.

Respectfully submitted,

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DATED: February 9, 1979.

APPENDIX A

OPINION OF THE SUPREME COURT OF NEW JERSEY

HARRY B. HELMSELY, et al.,
Plaintiffs-Appellants,

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BOROUGH OF FORT LEE, et al.,
Defendants-Respondents.

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vs.

BOROUGH OF FORT LEE, et al.,
Defendants-Respondents and Cross-Appellants.

Argued May 22, 1978—Decided October 17, 1978.

On certification to Superior Court, Law Division, Bergen County (A-164/165 *Americana Associates v. Borough of Fort Lee* and A-166/167 *New Jersey Realty Co. v. Borough of Fort Lee).*

Mr. Richard F. Aronsohn, Mr. Martin Kesselhaut and Mr. David N. Ravin argued the cause for appellants

(Messrs. Aronsohn, Kahn and Springstead and Messrs. Ravin and Kesselhaut, attorneys; Mr. Aronsohn, Ms. Lauren B. Cohen, Mr. Kesselhaut and Mr. Bernard Schenkler, on the briefs).

Mr. William T. Reilly, argued the cause for respondents (Messrs. McCarter and English, attorneys; Mr. Richard C. Cooper, of counsel).

Mr. Kenneth Meiser argued the cause for defendant-intervenor, New Jersey Department of the Public Advocate (Mr. Stanley C. Van Ness, Public Advocate of New Jersey, attorney).

Mr. John Atlas, Ms. Joan Pransky and Mr. Ronald Atlas submitted a brief on behalf of amici curiae The New Jersey Tenants Organization, The Essex County Housing Coalition, and The East Orange Tenants Organization.

The opinion of the Court was delivered by

MOUNTAIN, J. Rent control ordinances have proliferated in the five years following this Court's decision in *Inganamort v. Borough of Fort Lee*, 62 N.J. 521 (1973), which upheld a municipality's power to enact such an ordinance. The principles governing attacks on the facial validity of rent control ordinances were discussed at length in *Hutton Park Gardens v. West Orange Town Council*, 68 N.J. 543 (1975); *Brunetti v. Borough of New Milford*, 68 N.J. 576 (1975), and *Troy Hills Village v. Parsippany-Troy Hills Tp. Council*, 68 N.J. 604 (1975) (hereinafter sometimes called the "Trilogy"). In those cases, we held that a rent control ordinance must permit an efficient landlord to realize a "just and reasonable" return. *Hutton Park Gardens, supra*, 68 N.J. at 568; *Brunetti, supra*, 68 N.J. at 592; *Troy Hills Village, supra*, 68 N.J. at 620. On the present appeal, we are required to determine whether the application of the rent control ordinances of Fort Lee has

or has not denied landlords this minimum constitutional return.

I

Fort Lee enacted its first rent control ordinance in 1972. Under Ord. No. 72-1, landlords could increase rents by the percentage rise in the Consumer Price Index (hereinafter "CPI"). After the municipality's power to regulate rents was confirmed in *Inganamort v. Borough of Fort Lee, supra*, the ordinance was superseded by Ord. No. 74-32, effective November 6, 1974. Section 2 of the new ordinance still purported to limit rent increases to the percentage increase in the CPI. A crucial proviso, however, overrode the CPI limitation:

> Notwithstanding any of the foregoing provisions of this section to the contrary, no landlord may request or receive a percentage increase in rent with respect to any housing space which is greater than two and one-half (2½%) per cent of the last prior rent during any calendar year.

In light of recent economic trends, the practical effect of Ord. No. 74-32 was to impose a 2.5% ceiling on rent increases.[1] In addition, Section 6 permitted landlords to pass through to tenants increases in property taxes. Landlords could seek hardship relief to supplement the automatic increases. Guidelines governing the granting of such relief were embodied in Ord. No. 75-45.

The validity of Ord. No. 74-32, or the "2.5% ordinance," was immediately challenged in A-163, *Helmsley v. Fort Lee*, an action in lieu of prerogative writ. The twelve plaintiffs, owners of multiple-family dwellings in the

1. The Law Division has held recently that the 2.5% limitation also applied to charges for parking or garage space. *Central Towers Co. v. Borough of Fort Lee*, 160 N.J. Super. 223 (Law Div. 1978).

borough, contended that Ord. No. 74-32 was not justified by any housing emergency, and further that it deprived them of a fair and reasonable return on their investment.[2] On November 20, 1974 the trial court entered a temporary restraining order against enforcement of the 2.5% limitation on automatic rent increases.

On July 31, 1975 the trial court held the 2.5% limitation to be facially constitutional, but continued its order restraining enforcement. By order, the court permitted the landlords to raise rents up to the percentage increase in CPI, but increases greater than 2.5% were to be placed in escrow. The restraining order and escrow arrangement have been continued during the appellate process. On March 31, 1977 the Appellate Division affirmed the trial court judgment.

Meanwhile, Fort Lee had enacted a major revision of its rent control system on June 30, 1976. Ordinance No. 76-8 limited automatic rent increases to a "maximum annual percentage," or "MAP," which was derived from increases in real estate taxes and specified components of the CPI. Thus, rent increases were to be related to operating cost increases. The details of the MAP plan will be discussed in Section V, *infra*. The MAP formula was not to become effective, however, until thirty days after the "final and complete disposition" of the appeal in *Helmsley v. Fort Lee*. Ordinance No. 76-8 also repealed, effective imme-

2. We have confined our discussion to issues which are still present in this appeal. Thus, we will not address ourselves to Section 4 of Ord. No. 74-32, which tied rent increases to building and health code enforcement. The trial court held this section to be invalid, and Fort Lee has abandoned its cross-appeal. Similarly, defects which the trial court found in the tax surcharge provision were promptly corrected by amendments. Finally, we will not considered issues arising from Ord. 75-6, since they have been mooted by our decision in *Inganmott v. Borough of Fort Lee*, 72 N.J. 412 (1977), or the provisions of Ord. No. 76-8 dealing with landlords' security deposits for repairs, which are not implicated in the present appeal.

diately, the sections of Ord. No. 74-32 which permitted landlords to pass through to tenants real estate tax increases. The impact of the tax passthrough repealer was substantial; the 1976 tax rate had been recently announced, and it represented a 30% increase over the 1975 rate.

Ordinance No. 76-8 was immediately challenged in two actions in lieu of prerogative writs, A-164, *New Jersey Realty Co. v. Fort Lee* and A-166, *Americana Associates v. Fort Lee*, which were consolidated for trial. The Fort Lee Tenants Association, and later the Department of the Public Advocate, were permitted to intervene as defendants. On March 11, 1977 the trial court held the tax passthrough repealer valid, effective June 30, 1976, but invalidated all other sections of Ord. No. 76-8 because of the contingent effective date.

On July 21, 1977 we granted certification in *Helmsley v. Fort Lee* and in the appeals and cross-appeals in *New Jersey Realty Co. v. Fort Lee* and *Americana Assoc. v. Fort Lee* then pending unheard in the Appellate Division. 75 N.J. 31, 32 (1977). We vacated the Appellate Division judgment in *Helmsley*, consolidated and remanded all three cases for a plenary hearing on the issue of just and reasonable return, at the same time retaining jurisdiction.

The 17-day hearing on remand concluded on December 14, 1977. It would serve no useful purpose to attempt to summarize, however briefly, all of the evidence adduced at this hearing. Instead, we will here merely outline the nature of the proofs, referring to specific factual showings, where appropriate, in later sections of this opinion.

The keystone of plaintiffs' case was a survey of the operating histories of 35 multiple-family buildings in Fort Lee, prepared by a certified public accountant whose

clients include the operators of several Fort Lee apartment buildings. The 35 buildings in the survey contain 7542 apartments, or units; they comprise approximately 85% of all rental units in the borough. Fifteen buildings with 4958 units were classified as highrises, 11 buildings with 2053 units as lowrises, and 9 buildings with 531 units as garden apartments.[3] The survey included buildings whose landlords were not plaintiffs in this litigation. For each building, the landlord supplied detailed financial data for the years 1970 through 1976, including financial statements, utility and fuel bills, real estate tax bills, payroll and income tax returns, insurance and mortgage information, monthly rent rolls, and any applications for hardship relief. From these data several tables were prepared for each building showing actual profit and loss and projecting future trends under the 2.5% limitation. The plaintiffs' survey was interpreted by several expert real estate consultants. Other experts and several landlords discussed the theoretical and practical effects of rent control in Fort Lee. Several witnesses addressed the question of determining a just and reasonable return. Fort Lee presented only one witness, a real estate consultant. He testified in general terms about relevant factors in fixing a just and reasonable return. Finally, the chairman of the Fort Lee Rent Leveling Board testified as the court's witness. He described the Rent Leveling Board's procedures.

On March 1, 1978 the findings and determinations on remand were filed. The court determined that "the entire Fort Lee rent control mechanism" was confiscatory and hence invalid.

3. Highrises were defined as fireproof buildings with seven or more stories, lowrises as semi-fireproof buildings with fewer than seven stories, and garden apartments included all other buildings.

As the abbreviated procedural history above suggests, this appeal is the culmination of long and complicated litigation. The complaint in *Helmsley v. Fort Lee* was filed almost four years ago, in November 1974. The length of the litigation has produced an unusual procedural situation. The focus of the *Helmsley* case has shifted over time. What started as an attack on the facial constitutionality of Ord. No. 74-32 has become a challenge to the ordinance's validity as applied. This is, moreover, an unusual test of an ordinance "as applied," for we are asked to rule on the ordinance's application to the entire borough of Fort Lee, rather than to an isolated building. Plaintiffs have made no attempt to single out their properties; their proofs have been addressed to the borough-wide impact of the ordinance. In the case of an individual building, the landlord would be required to exhaust his administrative remedies by seeking hardship relief. *Brunetti v. Borough of New Milford, supra*, 68 N.J. at 588. In Fort Lee, however, no administrative body is empowered to review the general effect of the rent control ordinance, at issue in the present case.

One troublesome consequence of the procedural posture described above is that we must reach general conclusions about all apartments in Fort Lee. Plaintiff's data illustrate vividly the diversity among the 35 buildings in their survey, ranging from a 1260-unit highrise to an 11-unit garden apartment building. Further, even the financial histories of buildings with similar physical characteristics differ widely. Yet, to succeed, plaintiffs must demonstrate that the rent control ordinance has a widespread confiscatory impact upon the disparate buildings in Fort Lee.

II

Plaintiffs assert at the outset that there is no rational basis for enacting any rent control measure in Fort Lee. The preamble to Ord. No. 74-32 pointed to unwarranted, exorbitant rent increases to justify imposition of the 2.5% limitation. Plaintiffs claim that they have shown that rents in 1974 were at reasonable levels, and that no other factual basis for the ordinance existed.

Municipal authority to enact rent control ordinances under the police power delegated by *N.J.S.A.* 40:48-2 was recognized in *Inganamort v. Borough of Fort Lee, supra*, 62 N.J. 521 (1973). A rent control ordinance is a valid exercise of municipal power if there is any rational basis for the enactment. *Brunetti v. Borough of New Milford, supra*, 68 N.J. at 594; *Troy Hills Village, supra*, 68 N.J. at 616; *Hutton Park Gardens, supra*, 68 N.J. at 564-65.

Contrary to plaintiffs' contentions, their own proofs demonstrate an adequate factual basis for adoption of rent control in Fort Lee. In *Troy Hills Village, supra*, the municipality's expert testified that a vacancy rate of less than 3% indicated a serious housing shortage. Other testimony then showed that the local vacancy rate was less than 2%. We found that, on this basis, the governing body could rationally conclude that rent control was necessary. Similarly, in the present case, several of plaintiffs' experts stated that a 5% vacancy rate was typical of a housing market in equilibrium; one fixed a 3% vacancy rate as indicative of a housing shortage. Plaintiffs' financial data indicate a 1973 vacancy rate of less that 1.5% in 28 buildings with 4648 units. One 1260-unit complex, Horizon House, had a 7% vacancy rate which appears to

be aberrational. Even including Horizon House, the borough-wide vacancy rate was 2.6%. As in *Troy Hills Village, supra*, these data constitute a rational basis for adoption of rent control. We note parenthetically that vacancy rates dropped under Ord. No. 74-32. The 1976 vacancy rate in 35 buildings with 7542 units was 1.9%. Thus it is apparent that there continues to be a rational basis for rent control in Fort Lee.

The vacancy rate data render irrelevant plaintiffs' contention that no exorbitant rent increases preceded enactment of the 2.5% ordinance. We note in passing, however, that the testimony plaintiffs cite on reasonableness of rents was almost wholly conclusory, without adequate foundation. Further, plaintiffs' financial data are equivocal at best. Between 1970 and 1973, plaintiffs' data reveal percentage increases in net operating income, see Note 5 *post*, greater than the increase in the CPI in one highrise, 6 of 7 lowrise buildings, and 4 of 7 garden complexes. That is, for these buildings, landlords' profits were keeping ahead of inflation. While these data do not necessarily establish a pattern of rent gouging, neither do they refute the assertion in the preamble to Ord. No. 74-32 that speculative and unwarranted rent increases were being demanded.

III

We turn now to the constitutionality of Ord. No. 74-32, which limited annual rent increases to 2.5% and permitted landlords to pass through to tenants increases in real estate taxes. It is axiomatic that a rent control ordinance must permit an efficient landlord to realize a "just and reasonable return" on his property. *Hutton Park Gardens, supra*, 68 N.J. at 568. Satisfactory formulations

of just and reasonable return, however, have proven to be elusive. Before reaching the question as to what level of return is confiscatory, consideration must first be given to what constitutes the proper formula for computing a landlord's return.

There are at least three basic approaches to defining fair return. In an early regulatory case, the United States Supreme Court decreed that return on fair value must be the criterion for confiscation.[4] *Smyth v. Ames*, 169 U.S. 466, 545, 18 S. Ct. 418, 433, 42 L.Ed. 819, 849 (1898), decree modified, 171 U.S. 361, 18 S. Ct. 888, 43 L.Ed. 197 (1898). The Court later modified this position, approving (but not mandating) the use of return on investment. *Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 64 S. Ct. 281, 88 L.Ed. 333 (1944). A third standard, the fraction of gross income comprised by operating profits, was employed in the now-expired New Jersey Rent Control Law, L. 1953 c. 216. We upheld its constitutionality in *Jamouneau v. Harner*, 16 N.J. 500, 526-28 (1954), *cert. denied*, 349 U.S. 904, 75 S. Ct. 580, 99 L.Ed. 1241 (1955).

Plaintiffs attempted to show that the operation of the 2.5% ordinance had denied them a just and reasonable return on the value of their buildings. They presented several expert witnesses who attempted to calculate the rate of return upon the value of the property in "a hypothetical market in which the supply of available rental housing is just adequate to meet the needs of the various

4. Determination of fair value is a complex problem. Factors which may enter into a value determination include depreciated original cost, depreciated prudent investment, reproduction cost less depreciation, market value, and earning capacity. See, *e.g.*, *Troy Hills Village, supra*, 68, N.J. at 624-25; *Public Service Co-ordinated Transport v. State*, 5 N.J. 196, 217 (1950). The problem of valuation will be discussed below in light of the record in the present case.

categories of persons actively desiring to rent apartments in the municipality." *Troy Hills Village, supra*, 68 N.J. at 624. Plaintiffs' proofs were insufficient to show confiscation on this theory.

First, plaintiffs failed to meet the standards articulated by their own witnesses. Stephen Lewinstein, John Bailey and R. A. Stuart Miller testified as experts in evaluating real estate investment opportunities. They stated that investors desired a rate of return on value, defined as the ratio between net operating income ("NOI") and value,[5] of 10.5% to 12%. In addition, Bailey presented data showing apartment building sales in which the expected net

5. As defined by all witnesses, the net operating income is total income less *operating* expenses (*e.g.*, maintenance costs, administrative expenses, fuel, real estate taxes). Depreciation, a noncash item, is not considered an operating expense. Debt service is not classified as an operating expense, and will be paid out of net operating income. NOI less debt service is the landlord's cash flow before income taxes.

One witness, a certified public accountant, defined rate of return on value as the ratio between "net profit before debt service" (net operating income less depreciation) and equalized assessed valuation. This definition conflicted with that used by every other witness; further, this witness's definitions of profit and value are both highly artificial. He employed an arbitrary depreciation allowance (2.5% of assessed valuation in 1970) which bore no relationship to the actual depreciation claimed by individual landlords. Nor did he explain his decision to include a noncash "expense" (depreciation) while excluding debt service, an even larger cash item. Finally, deducting depreciation without recognizing its utility as a tax shelter may be misleading.

His definition of value is also open to question. He employed equalized assessed valuation, which is the assessed valuation multiplied by an equalization factor which reflects the relationship between assessed valuation and sales price for recent arms'-length transactions in the borough. There was no general reassessment in Fort Lee between 1970 and 1976; therefore, the substantial increase in equalized assessed valuation for individual buildings in that period is based solely on changes in the equalization ratio. According to the record, however, there were no arms'-length sales of apartment biuldings in the borough during the same time. Thus, the inflated equalized assessed valuations for apartment houses would appear to have been based on the increased value of non-apartment properties. In light of plaintiffs' assertions that their buildings have decreased in value under rent control, and the successful outcome of several recent tax appeals by landlords, we are forced to conclude that the equalized assessed valuations did not approximate the buildings' market value.

operating income ranged from 8% to 12% of the sales price. Plaintiffs contended in their brief that the expert testimony established that investors desired a rate of return "in the range of 10%." Assuming *arguendo* that this is the minimum constitutional "just and reasonable" return, see *Hutton Park Gardens, supra,* 68 N.J. at 568, we consider plaintiffs' value data.

As we will discuss below, estimation of value presents difficult problems of proof. For the moment, we will accept plaintiffs' proffered expert opinions on value. R. A. Stuart Miller estimated the value of 22 buildings in 1976 in a hypothetical equilibrium market. (Bailey presented similar estimates for three buildings, but no conclusions as to the general impact of a rent control ordinance can be drawn from a sample so small.) Using Miller's valuation material and the 1976 net operating income derived from plaintiffs' survey, we can calculate rates of return on value. These data reveal rates of return "in the range of 10%," [6] plaintiffs' postulated desired return. Thus, by plaintiffs' own criteria they have failed to prove that return on value was confiscatory.

This case was the first serious attempt to prove a rent control ordinance confiscatory as applied under *Troy Hills Village, supra.* Consequently, we feel constrained to

6. The table below summarizes the range of rates of return observed using 1976 net operating income and Miller's hypothetical equilibrium valuations.

Type of Building	*Range*	*Median*
Highrise	8.6-11.7%	9.6%
Lowrise	9.2-11.0%	9.7%
Garden	9.2-10.2%	10.1%

All "1976 net operating income" figures in this opinion have been adjusted, where possible, to include any uncollected fraction of the 1976 property tax passthrough. This adjustment is necessary in light of the economic significance of the tax passthrough as indicated in our discussion of the impact of its repeal. See section IV *post*.

comment on some of the problems which were revealed by this litigation. As predicted in *Troy Hills Village, supra,* valuation presented "difficult problems of proof." 68 N.J. at 624. The preferred valuation method for apartment buildings is capitalization of income, since investors purchase apartment buildings as income-producing properties. See North, "Appraisal of Apartment Buildings," in *Encyclopedia of Real Estate Appraising* 196 (Friedman ed. 1968). Not surprisingly, all the valuation data at the remand hearing were based on capitalization of income. Once income is controlled, however, using capitalization of income to determine value to regulate future income is a circular process.[7] In theory, one could rely upon comparable sales data to avoid the circuity problem. In practice, unfortunately, arms'-length sales of rent controlled apartment buildings are rare. None has been reported in Fort Lee since rent control was imposed in 1972. Sales prices of "comparable" buildings not subject to rent control offer little guidance. The source of an apartment building's value is its income stream; therefore, income will be a crucial factor in determining comparability. Rent control, however, limits the potential growth of that income stream (and also therefore the potential capital

7. For example, assume that a rent leveling board determines that the proper capitaliziation rate is 10%. The value of a building with net operating income of 100,000 is therefore $1,000,000. If net operating income drops to $90,000, "value" falls to $900,000, and the owner is still technically receiving a 10% return on value.

If a rent leveling board sets a rate of return that is not the same as the capitalization rate, the result is an income-value spiral. Assume, as before, a 10% capitalization rate to determine value. Also assume that a rent leveling board decides to permit an 11% return on value to encourage maintenance. The building with net operating income of $100,000 is still valued at $1,000,000, but the landlord's permitted return is $110,000. The value of a building with net operating income of $110,000, however, is $1,100,000. Therefore, permitted return must increase to $121,000, leading to increased value, and so on. Conversely, permitting a rate of return less than the capitalization rate leads to a downward income-value spiral.

appreciation on resale). Thus, the expected future income of a building subject to rent control will be less than that of a "comparable" uncontrolled building. The difference in future income will, of course, be reflected in present value. Construction or replacement cost, a third valuation method, is used primarily for insurance appraisals of apartment buildings. At best, it determines an upper limit on present market value. See *North, supra,* at 197; Wendt, *Real Estate Appraisal* 212 (1956). Finally, assessed valuation will be based on one or more of the above methods, and will therefore be vulnerable to corresponding criticism.

The theoretical problems of valuation were here compounded by the practical difficulties of estimating value in a hypothetical housing market where supply and demand are in equilibrium. None of the witnesses had performed such an analysis before; none knew of any recognized appraisal method for making hypothetical equilibrium valuations. Indeed, plaintiffs' expert testimony concerning the existence of equilibria in Fort Lee was contradictory. Further, no satisfactory foundation was laid for much of this testimony. Hypothetical equilibrium valuations in rent controlled markets must depend upon comparisons with other municipalities or other time periods, since rent control would not be necessary if the housing market were in equilibrium. In *Parkview Village Assoc. v. Borough of Collingswood,* 62 N.J. 21, 30-33 (1972), this Court discussed the use of "comparable" buildings in valuation. We stressed that comparisons with several buildings with similar physical characteristics from the same geographic area should be used. *Parkview Village Associates, supra,* dealt with tax assessments, where local comparisons are readily available. Under rent control, however, contemporaneous local comparisons are unavailable by hypothesis.

Furthermore, the requisite foundation for comparability of geographically remote buildings is difficult and expensive to establish.

In *Troy Hills Village, supra,* we outlined tentative guidelines for determining whether a rent control ordinance was confiscatory. At the same time, we cautioned that further litigation would be needed to illuminate this complex subject. After considering the massive record compiled by plaintiffs, we are satisfied that a value-based criterion for confiscation under rent control is practically unworkable.

Plaintiffs did not restrict their arguments to return on value. Although they presented no data on the amount of their investment,[8] they did introduce detailed histories of operating expenses and income for 85% of all apartment units in Fort Lee. This information permits us to evaluate the borough-wide impact of the challenged ordinance upon landlords' net operating income.

Several income-based standards for confiscation under rent control have been employed in other legislation. One such approach places a ceiling upon the fraction of total income a landlord can be expected to spend for operating expenses. For example, the New Jersey Rent Control Law, L. 1953, c. 216 §16(h), permitted landlords to seek a rent increase when operating expenses rose above 75% of total income. The rent control bill introduced last session in our Legislature contained a similar provision,

8. In view of the lack of evidence concerning plaintiffs' investment, we offer no comments on investment-based criteria for determining confiscation. Our silence does not, however, denote disapproval. Other jurisdictions have employed such criteria. See, *e.g., Marshal House, Inc. v. Rent Control Bd. of Brookline,* 358 Mass. 686, 266 N.E.2d 876, 888 (1971). Although an investment-based standard may not be as easy to apply as some income-based criteria, there are no obvious theoretical obstacles to using an investment-based standard.

but relaxed the confiscation threshold to 60% of total income. New Jersey Assembly Bill No. 504 (1978). New York City's maximum base rent ("MBR") formula allots 57.6% of total income to operating expenses for buildings under rent control.[9] Note, *The ABC's of MBR: How to Spell Trouble in Landlord/Tenant Relations*, 10 *Colum. J. Law & Soc. Prob.* 113, 123 (1974). A second approach, used in Cambridge, Massachusetts, guarantees a landlord a "fair net operating income," based upon the actual NOI in a base year adjusted to compensate for inflation. In other words, the Cambridge plan assumes that a landlord's profits at a specified date in a free housing market were fair. The inflation adjustment thus attempts to keep the landlord in the same economic position under rent control.

Turning to Fort Lee, rent control has had a perceptible impact upon the magnitude of NOI and upon the fraction of gross income that NOI represents.[10] NOI in 1976 current dollars remained at or slightly below 1973 levels in most buildings. The highrises as a class fared distinctly worse than lowrise and garden complexes. The median

9. There are two systems of rent regulation in New York City. Rent control, administered by a city agency, employs a formula to determine the maximum base rent for each unit. Rent stabilization is administered by a private real estate industry organization under the supervision of a city agency. Stabilized rents are permitted to rise by a pecentage based on the Bureau of Labor Statistics Price Index of Operating Costs for Rent Stabilized Apartments in New York City. ("NYC Index").

10. NOI in 1976 as a percentage of its level in 1973 is tabulated below for 22 buildings built before 1970:

Class	*Range*	*Median*
Highrise	76.6-103.9%	94.5%
Lowrise	93.2-104.3%	99.1%
Garden	77.6-102.2%	99.6%

The "operating ratio" (the ratio between operating expenses and total income) is tabulated below for the same buildings.

Class	*1973*		*1976*	
	range	median	range	median
Highrise	.425-.594	.475	.529-.661	.566
Lowrise	.397-.554	.416	.472-.585	.521
Garden	.353-.577	.415	.443-.678	.505

change in highrise NOI was approximately a 5% decrease between 1973 and 1976; the median change for lowrise and garden complexes was less than 1%. While isolated buildings showed declines in NOI of up to 25%, no building experienced a substantial increase. Over the same time period, the Consumer Price Index increased approximately 30%. Thus, in terms of purchasing power, all landlords' NOI decreased by roughly one-quarter.

The operating ratios show that landlords were spending approximately 10% more of their income for operating expenses in 1976 than in 1973. The median operating ratio for highrises, .566, was approaching the .600 level deemed confiscatory by Assembly Bill No. 504; four highrises with 1900 units had operating ratios greater than .600. "New" buildings (defined by plaintiffs as those fully rented after 1970) appeared to be in financial distress in 1976. In seven new buildings, with 1744 units, income was not adequate to cover operating expenses and debt service. Only five new buildings, with 439 units, had positive cash flows in 1976.

These data must be measured against plaintiffs' goal: to invalidate the 2.5% limitation as applied to all apartments in the borough, not simply to a single building. To succeed, plaintiffs must show by clear and convincing evidence that the ordinance had a wide-spread confiscatory impact upon efficient landlords. See *Hudson Circle Service, Inc. v. Kearny*, 70 N.J. 289, 298-99 (1976); *Hutton Park Gardens, supra*, 68 N.J. at 564-65; *Moyant v. Paramus*, 30 N.J. 528, 534-35 (1959). The 1976 data fail to meet this standard on several counts.

First, the 1976 data show NOI in most buildings, including highrises, to be within 5% of the 1973 level. The financial histories submitted by plaintiffs, however, contain

sizable year-to-year discontinuities in operating costs for individual buildings. A simple comparison of figures for 1976 and 1973 is vulnerable to distortion caused by abnormalities in either the 1976 or 1973 data. Plaintiffs have not submitted any more sophisticated statistical analysis. Therefore, we are reluctant to attach great significance to relatively small changes in the median NOI level. We recognize that an unchanged NOI in current dollars represents a loss in purchasing power in an inflationary economy. In theory, long-term stagnation of profits might be proved to be confiscatory. On the present record, however, we cannot say that the 2.5% limitation was confiscatory because landlords' profits remained approximately constant between 1973 and 1976.[11]

Second, the 1976 operating ratios are similarly inconclusive. Although they are rising, we cannot say on this record that the general level is clearly confiscatory. Here again, plaintiffs presented only sketchy and conclusory testimony.

Third, low NOI and high operating ratios appear to be concentrated among a small number of buildings, many of which have unusual financing arrangements or operational experience.[12] These buildings may well qualify for hard-

11. Further, the comparisons we have drawn are sensitive to the definition of pre-rent control profits. We have used 1973, the last complete year before Ord. No. 74-32 was enacted. 1973, however, was a better year for most Fort Lee landlords than either 1972 or 1974. Because the 2.5% limitation took effect only as leases expired in November and December, Ord. No. 74-32 had virtually no impact in 1974. It would be unfair to the landlords, however, to use 1974 as the standard for pre-control profits, since the Arab oil embargo drastically reduced profits that year. On the other hand, the pattern of rent increases in 1970-73, see section II *ante*, suggests that using 1973 as the standard may be unduly generous to the landlords. Under these circumstances, we do not find the 1976 profit level to be confiscatory.

12. For example, the largest complex with financial troubles is Horizon House, a 1260-unit highrise. In 1975 its operating ratio was 0.689; in 1976 after HUD preempted local rent control and permitted a 6% rent increase, the operating ratio remained a high 0.667. The financial distess of Horizon

ship relief. A limited number of hardship cases alone, however, does not show widespread confiscation. In the *Trilogy*, *supra*, we anticipated the likelihood that isolated buildings might require hardship relief from the workings of reasonable rent control schemes. Plaintiffs have not shown that the hardship applications through 1976 were not isolated cases.

Although plaintiffs failed to prove that the 2.5% ordinance had a confiscatory effect before December 31, 1976, their proofs demonstrate that the foreseeable impact of the 2.5% limitation after 1976 will be widespread confiscation. Using the financial data plaintiffs submitted, we can construct a conservative picture of a representative, efficiently run Fort Lee building. In 1976, its operating ratio was 0.500, and its NOI was roughly equal to its NOI in

House is not in doubt. Its posture as a representative of efficient Fort Lee operators, however, is questionable. In 1970-72, while most other landlords in Fort Lee enjoyed rising profits, Horizon House's NOI plummeted 30%. In 1973, NOI recovered slightly, but the operating ratio (0.594) was the highest in Fort Lee. In addition, the Horizon House vacancy rate was the highest in the borough in 1973, more than double the overall vacancy rate. Thus, it is clear that Horizon House's financial woes predate the 2.5% ordinance. Its experience under the ordinance cannot be considered typical of other buildings.

Four buildings had negative cash flows and operating ratios above 0.600 in 1976: Imperial House, a 55-unit highrise built in 1969; Bridge Plaza Towers, a 114-unit highrise fully rented in 1974; Colony Apartments, a 484-unit highrise fully rented in 1974; and The Riviera, a 35-unit lowrise fully rented in 1974. The financial data of the four buildings suggest that, like Horizon House, their 1976 experience is not typical of other Fort Lee buildings. Imperial House's NOI fell by 25% in 1976, largely as a result of a 40% increase in operating expenses (excluding real estate taxes). The corresponding increase in expenses for other old highrises ranged from 2% to 17%. While Imperial House's expenses may have been reasonable for that building, its 1976 experience is clearly not representative of other Fort Lee highrises. Bridge Plaza Towers and The Riviera both appear to have unusually heavy debt service obligations (approximately 40% and 45% of total income in 1976, respectively) in comparison with other buildings. Debt service consumes about 33% of income for older highrises and 25% for older lowrises. Again, we question only the typicality, not the reasonableness, of these financing expenses. Finally, the Colony also has extremely high debt service (42% of 1976 income), due to recent high interest rates coupled with an unusually large dependence upon debt financing. In receivership, the Colony can hardly be termed a typical Fort Lee building.

1973. Its debt service consumed approximately one-third of its 1976 income if it was a highrise (approximately one-quarter otherwise).

We now consider the future effect of limiting rent increases to 2.5%. Under the ordinance, real estate tax increases will be passed through to tenants. The automatic rent increase will cover a 5% increase in other operating expenses. If, however, other operating expenses increase faster than 5% annually, NOI will decline proportionately.[13] To determine the landlord's cash flow, we must deduct debt service from NOI. A representative highrise would pay roughly one-third of its 1976 income for debt service. For such a building, the example in note 13 *ante* shows that five years of 6% operating expense increases and 2.5% rent increases would produce a 5.4% decrease in NOI. After deducting debt service, however, the landlord's cash flow would decrease approximately 20%.

In fact, operating expenses cannot be expected to increase at a uniform rate. The NYC Index, see note 9 *ante*, and the CPI have risen erratically in the last decade, as the table below shows.

Year	*NYC Index**	*% Increase*	*CPI**	*% Increase*
1967	100.0		99.3	
1968	103.5	3.5	102.9	3.6
1969	107.6	4.0	109.7	6.6
1970	116.6	8.4	117.7	7.3
1971	132.2	13.4	124.6	5.9
1972	139.7	5.7	130.4	4.7
1973	150.8	7.9	137.5	5.4
1974	179.7	19.2	150.9	9.7
1975	191.3	6.5	163.7	8.5
1976	203.5	6.4	174.3	6.5
1977	219.5	7.9	183.7	5.4

* The NYC Index is determined in April of each year. For comparability, the CPI in the table is the New York, N.Y.-Northeastern N.J. "All items" index for April of each year.

13. The table below shows the effect of a 2.5% automatic rent increase and a 5% increase in operating expenses each year.

Neither the CPI nor the NYC Index is a perfect measure of landlord's expenses in Fort Lee. Both indicate, however, an annual rate of inflation substantially in excess of 5%. In fact, the rent guidelines based on the NYC Index permitted landlords to increase rents 6.5% on one-year leases through June, 1978. The rate was lowered to 3.5% effective July, 1978. In short, there is nothing in the record to suggest that the increase in operating expenses may be expected to be limited to no more than 5% annually. Consequently, the unrelieved operation of the 2.5% automatic increases can be expected to diminish NOI steadily for most, if not all, landlords in Fort Lee.[14]

The last statement distinguishes the effect of rent control in Fort Lee before and after 1976. As discussed above,

Year	*Income*	*Op. Exp.*	*NOI*
1976	$100,000	$50,000	$50,000
1977	102,500	52,500	50,000
1978	105,062	55,125	49,937
1979	107,689	57,881	49,808
1980	110,381	60,775	49,606

The table below shows the effect of a 2.5% automatic rent increase and a 6% increase in operating expenses each year.

Year	*Income*	*Op. Exp.*	*NOI*
1976	$100,000	$50,000	$50,000
1977	102,500	53,000	49,500
1978	105,062	56,180	48,882
1979	107,689	59,550	48,139
1980	110,381	63,124	47,257

In both cases, a highrise would require about $33,000 for debt service. Other types of buildings would require $25,000.

14. The main reason that NOI did not decrease sharply before 1976 appears to be that the full impact of the 2.5% limitation was delayed. The limitation only affected leases signed after November 6, 1974. During the next year, as leases expired, the limitation was phased in. Not until 1976 was a full year's income subject to the 2.5% limitation. Thus, 1976 income was 13% greater than 1973 income for 20 older buildings; had the limitation been fully effective in 1974 and 1975, the permissible increase would have been less than 8%. Further many landlords did not apply the 2.5% limitation to garage rents, and they attempted to compensate for the ceiling on apartment rents with substantial increases in garage charges. This strategy was recently invalidated by the Law Division. See note 1 *ante*.

the financial data through December 31, 1976 do not show a general confiscatory impact throughout the borough. Some buildings prospered while others suffered losses. The "average" building had profits in 1976 approximately equal to pre-control profits in 1973. Where financial difficulties were manifested, they were frequently traceable to pre-control sources not common to other buildings. After 1976, however, the picture changes. As a result of the disparity between increases in rents and in operating expenses, the "average" landlord can expect profits to fall for the indefinite future. At some point, steady erosion of NOI becomes confiscatory.[15] The exact date will differ for each building, but the result is foreseeable. We need not determine the exact threshold of confiscation. That, too, may differ for each building. The general effect of the ordinance, however, is clear.

The Constitution does not require a municipality to permit all cost increases to be passed through to tenants in rent-controlled units. *Troy Hills Village v. Tp. Council of Parsippany-Troy Hills, supra*, 68 N.J. at 632. A rent control scheme must, however, permit landlords to realize a just and reasonable return. *Id.* In *Brunetti v. Borough of New Milford, supra*, 68 N.J. at 590 n. 16, we stated:

> Plaintiffs argue that this holding would permit a municipality to dispense with all automatic increases and require hearings prior to any rental increase. They are correct; so long as the procedure is not so arbitrary and unavailable as to preclude relief, there is no constitutional obstacle to this approach.

In a companion case we also observed that ordinances should include standards and criteria which would enable

15. We do not hold that keeping NOI constant (in current dollars) indefinitely is not confiscatory. The effect of such long-term stagnation of profits is not before us.

a landlord to determine whether it is entitled to hardship relief. *Troy Hills Village, supra*, 68 N.J. at 620-21.

The Supreme Court of California recently considered the constitutional sufficiency of administrative relief under a rent control ordinance in *Birkenfeld v. City of Berkeley*, 17 Cal. 3d 129, 130 Cal. Rptr. 465, 550 P.2d 1001 (1976). There, rent control was adopted as an amendment to the city charter. Base rents were established by a rent rollback. Rent increases were permitted only by approval of a five-member rent control board after a hearing on a unit-by-unit basis. Petitions for rent increases in multiple units in one building could be consolidated only with the written consent of a majority of the affected tenants. Each petition had to include a certificate of compliance with all building code provisions issued within the last six months. In reviewing the petitions, the board was directed to consider a list of factors similar to that in Fort Lee Ord. No. 75-45.

The California Supreme Court held unanimously that the charter amendment was facially unconstitutional because the procedure it prescribed for rent adjustments made inevitable unreasonable delays in raising confiscatory rent ceilings. 17 Cal. 3d at 169, 130 Cal. Rptr. at 493-94, 550 P.2d at 1029-1030. The Court stated:

> It is clear that if the base rent for all controlled units were to remain as the maximum rent for an indefinite period many or most rent ceilings would be or become confiscatory. *For such rent ceilings of indefinite duration an adjustment mechanism is constitutionally necessary to provide for changes in circumstances and also provide for the previously mentioned situations in which the base rent cannot reasonably be deemed to reflect general market conditions. The mechanism*

> *is sufficient for the required purpose only if it is capable of providing adjustments in maximum rents without a substantially greater incidence and degree of delay than is practically necessary.* "Property may be as effectively taken by long-continued and unreasonable delay in putting an end to confiscatory rates as by an express affirmance of them . . . ." (*Smith v. Illinois Bell Tel. Co.* (1926) 270 U.S. 587, 591, 46 S. Ct. 408, 410, 70 L. Ed. 747 (enjoining enforcement of telephone rates because of unreasonable delay in acting upon application for rate increase).) The charter amendment is constitutionally deficient in that it withholds powers by which the rent control board could adjust maximum rents without unreasonable delays and instead requires the Board to follow an adjustment procedure which would make such delays inevitable. [17 Cal. 3d at 169, 130 Cal. Rptr. at 494, 550 P.2d at 1030; emphasis added]

The court specifically criticized the board's inability to formulate and apply general rent adjustments or to delegate any of the required hearings.

In a similar decision, the District of Columbia Court of Appeals ordered implementation of prompt administrative relief before a rent control plan could take full effect. *Apartment & Office Building Assoc. v. Washington*, 343 A.2d 323 (D.C. Ct. App. 1975). The District of Columbia Rent Control Act of 1973 authorized the District of Columbia City Council to adopt a rent control plan which permitted landlords to pass cost increases through to tenants. The council enacted a rent control regulation which set base rents through a rent rollback procedure and established a Housing Rent Commission, whose approval was a prerequisite to any rent increase. The court ruled that

"a condition precedent to enforcement of rent control is a viable means whereby landlords may recoup the amount of increased costs to which they are entitled." 343 A.2d at 326. Although the regulation required the Commission to act upon petitions for rent increases within 60 days, the Rent Commission had admitted that it could dispose of only a small fraction of petitions within that time. The court stated:

> . . . the hardship adjustment procedure is inherently incapable of functioning as the required pass-through mechanism. *Despite the fact that a maximum 60-day limit for agency actions seems reasonable, appellants' statutory rights become totally illusory if the system charged with protecting them becomes so lethargic and cumbersome as to be inoperable.* Hence, Regulation No. 74-20 was promulgated without even a meaningful expectation of implementing the required pass-through right, despite the purported method of dealing with the matter. [343 A.2d at 331, footnotes omitted; emphasis added]

The court affirmed the trial court's order staying the rent rollback and directed the city to implement within 90 days an effective cost pass-through mechanism. One judge would have held the regulation facially invalid because of its "cumbersome procedures." 343 A.2d at 334. One judge criticized the latter position, arguing that "[b]ecause a statute or regulation is unworkable due to lack of personnel does not mean it is *facially* invalid." 343 A.2d at 336 (emphasis added). He concurred, however, in staying the rent rollback because of the unavailability of hardship relief.

The Berkeley and Washington, D.C. rent control plans differ in many respects from that of Fort Lee. Berkeley's

unit-by-unit adjustment, for example, has no Fort Lee parallel. Washington's cost pass-through requirement was statutory, not constitutional, in origin. These differences need not detain us. The principles expressed in the California and District of Columbia cases, *supra*, are not derived from the minutiae of individual rent control plans. Rather, these cases are based upon the commonplace notion that effective remedies are necessary to safeguard legal rights. Landlords in Berkeley, Washington, and Fort Lee all are entitled to some minimum income level. In Berkeley and Fort Lee, that level is the minimum necessary to yield a constitutional return; under the Washington statute that level may be higher than the constitutional minimum. In Berkeley and Washington the absence of any automatic rent increases virtually guaranteed that a landlord's income would fall below the minimum acceptable level pending administrative approvals of rent increments. The inadequate automatic rent increases in Fort Lee will foreseeably lead to similar confiscatory results.

We share the view of the California Supreme Court that where a rent control scheme will have a foreseeable, widespread confiscatory impact, it is constitutionally necessary to provide a mechanism "capable of providing adjustments in maximum rents without a substantially greater incidence and degree of delay than is practically necessary." *Birkenfeld*, *supra*, 17 Cal. 3d at 169, 130 Cal. Rptr. at 494. The landlord of a rent controlled building in Fort Lee must realize inadequate income before it can obtain relief. The confiscation precedes the redress in this case. Some short-term uncompensated confiscation may well be unavoidable under rent control, but it is essential that the severity and duration of such takings be minimized.

The foreseeable confiscatory effect of the 2.5% limitation requires us to examine the availability of administrative

relief under the Fort Lee ordinances. Hardship applications are decided by the Fort Lee Rent Leveling Board ("Board"). The Board must contain one representative of each of the landlords, tenants, and homeowners; aside from this, there are no special requirements for membership. The seven-member Board serves without compensation. Although Ordinance No. 74-32 provided for appeals to the borough council, the council has not, in practice, reviewed Board decisions.

Hardship relief, if granted, expires in one year unless it is reconsidered and renewed by the Board. It is not an adjustment to the base rent used to compute automatic increases. There is no mechanism in the Fort Lee ordinances for readjusting base rents, or for granting any general increases in response to common, sudden cost increases such as the 1974 jump in fuel prices. Consequently, a successful hardship applicant must reapply every year. Under present economic conditions, the combined effect of this hardship relief structure and the 2.5% limitation must be to force a greater and greater number of landlords to seek annual hardship relief.

This is not mere conjecture. The Rent Leveling Board received three hardship applications in 1975 and four in 1976. In 1977, the Board received 12 applications covering more than 3173 units. It granted hardship relief to 8 buildings with more than 2328 units aggregating $1,128,180.[16] These hardship awards ranged from 1.4%

16. Of this sum, however, one $599,757 award was not of immediate benefit to the landlord. The Board granted the award only after its original denial of relief was reversed by the Law Division. Pending resolution of the appeal, the Board ordered the entire award placed in escrow.

The 1977 hardship applications reflected the tax passthrough repealer of Ord. No. 76-8. Only one of the 8 awards would have been denied if the tax passthrough had remained in effect all year. This borderline case was a $121,357 award granted to Horizon House (1260 units) which had an uncollected tax passthrough of $219,631.

to 38.1% of total income; the median percentage surcharge was 13.65% (more than five times the annual automatic increase). In addition, the Department of Housing and Urban Development ("HUD") preempted local rent control for one 292-unit building.[17] Although three applications filed contemporaneously with requests for HUD preemption were processed by the Board within a month, the other applications were decided in two to five months. Decisions normally followed two or three public hearings.

In addition to the delay incidental to handling applications, the availability of financial data led to a further regulatory lag. For example, Bimar Fort Lee applied for hardship relief in August, 1976, and submitted financial information through December 31, 1975. After six hearings in November and December, 1976 and January, 1977, the Board issued its decision in February, 1977. Based on the 1975 data, Bimar received a $12,400 (9.76%) hardship award, payable in five monthly installments. No attempt was made to estimate the effect of known cost increases in 1976 (such as the tax passthrough repealer). In November, 1977 Bimar reapplied for hardship relief. After one hearing, the Board granted the landlord hardship relief of $25,582 (19.3%) in February, 1978 payable in 12 monthly installments. This decision was based on Bimar's financial position as of December 31, 1976.

For the reasons stated immediately below, we conclude that the Fort Lee ordinances did not provide constitutionally adequate administrative relief from the confiscatory

17. Under 24 *CFR* § 403, HUD may preempt the application of local rent controls to a building with a federally insured mortgage if the local rent regulation "jeopardizes the Department's interest in the project." See generally Note, "Pre-emption of Local Rent Control Laws by HUD Regulation," 45 *Fordham L. Rev.* 651 (1976); Note, "HUD Pre-emption of Local Rent Control Ordinances — Tenants Entitled to Due Process Rights," 30 *Rutgers L. Rev.* 1025 (1977).

effects of the 2.5% limitation. First, the time required to process hardship applications is substantial. The Rent Leveling Board has improved significantly upon the four-to-nine month delay observed in 1975. In 1977, however, only applications which were subject to HUD preemption were processed in less than two months. Preferential treatment is accorded HUD-insured mortgagors as a result of an agreement between the Rent Leveling Board and HUD. (In 1975-76, HUD preempted local rent control over three buildings containing 2059 units.) The Rent Leveling Board's cooperative attitude toward the federal agency is, of course, laudable. It is not clear, however, why the Rent Leveling Board is unable to process *all* applications with equal dispatch. Hardship applications which were not subject to HUD preemption were disposed of in two to four months. In the event that some applications are to be expedited, it seems inequitable to delay applicants who have no other avenue of relief. The Rent Leveling Board promises further improvement in processing time, but Mr. Ellman, chairman of the Board, testified that the Board was already overburdened with its present hardship caseload. In light of the foreseeable increase in the number of hardship applications with declining NOI, future improvement is to be desired but can hardly be expected.

Second, regulatory lag has rendered inadequate the hardship awards actually granted. As noted above, Bimar Fort Lee received such awards in February 1977 and 1978, based upon data for 1975 and 1976, respectively. The 1976 relief was to be paid in 12 monthly installments, so theoretically the landlord would not have received his constitutionally minimum return for 1976 until February, 1979. In practice, of course, the landlord and Rent Leveling Board simply treat the award as income when received. From that perspective, however, hardship relief is equally ineffective. The

Rent Leveling Board calculates what it considers to be the minimum constitutional return for the last fiscal year. The Board then grants relief exactly equal to the difference between the minimum constitutional and the actual return for that year. Because hardship awards do not become adjustments to base rent, and because landlords' cost increases can be expected to exceed the 2.5% automatic rent increase each year, the magnitude of a building's hardship award can also be expected to increase every year. Thus, the award which would have boosted Bimar's 1976 rate of return to the constitutional minimum will be inadequate to render constitutional the rate of return in 1978, when the award was actually received. Thus, even if a landlord qualifies for hardship relief, the current rate of return will remain below the constitutional minimum indefinitely.

Obviously, some regulatory lag is to be expected; indeed, the landlord's delay in assembling financial data contributes to the problem in the present case. This does not, however, justify the Rent Leveling Board in ignoring the consequences of administrative delay. After July, 1976, for example, the financial impact of the tax passthrough repealer was a matter of public record. Yet the Rent Leveling Board made no attempt to consider the current effect of the repealer in accessing hardship applications.[18] This problem has long been recognized in connection with setting rates for public utilities. Our decisions in that context describe such regulation as "a predictive science," *State v. N. J. Bell Tel. Co.*, 30 N.J. 16, 31 (1959), and emphasize that rates must provide a constitutional return

18. Most of the 1977 applications relied upon 1976 data, which included as income the pre-repeal fraction of the tax passthrough. In 1977, however, there would be no tax passthrough income. Nevertheless, hardship awards granted in 1977 were based on the 1976 data alone.

in the year in which they are in effect. *Id.; In re Board's Investigation of Telephone Cos.*, 66 N.J. 476 (1975); *In re Intrastate Industrial Sand Rates*, 66 N.J. 12 (1974).

Third, the Rent Leveling Board's lack of power to revise base rents exacerbated the first two problems. Because the base rent remained disproportionately low despite any hardship award, the annual gap between income and expenses would inevitably grow, increasing reliance upon the hardship mechanism.

Fourth, the publicly-stated criteria for hardship relief were so vague that landlords could not know with reasonable certainty whether they would qualify. Justice Pashman warned of this pitfall in *Troy Hills Village, supra*, 68 N.J. at 621: "To say nothing more, for example, than that a landlord may seek relief if he cannot realize a reasonable profit from his investment would be inadequate ° ° °." Fort Lee Ord. No. 75-15 authorizes hardship relief if "a landlord cannot meet his mortgage payments, taxes, and current operating expenses on the dwelling, or cannot otherwise earn a fair and reasonable return upon his investment ° ° °." The "fair and reasonable return" condition in Ord. No. 75-45 is essentially identical to the example disapproved in *Troy Hills Village, supra*. The remaining condition is, if anything, worse. Since it makes no provision for a reasonable profit, it describes less than the minimum constitutional return. It appears to the legally unsophisticated reader, however, to state criteria for relief. Therefore, it may discourage meritorious hardship applications. Further discouragement is found in the cost of the Fort Lee hardship procedure. Several landlords stated, without contradiction, that the cost of an individual hardship application for a large highrise building exceeded $10,000. In addition, the Rent Leveling Board has assessed application fees of

up to $1,500 to pay for its accountant's fees. It is not surprising, therefore, that the magnitude of the hardship awards, several times the annual automatic rent increase, suggest that landlords did not apply for hardship relief in the first year their rate of return fell below the constitutional minimum as defined by the Rent Leveling Board.

Finally, we have serious reservations about the constitutionality of the Rent Leveling Board's method of computing just and reasonable return. The Board purports to allow a specified rate of return upon the landlord's net cash investment after payment of reasonable operating expenses and debt service. The testimony concerning calculation of investment by the Board was confused, and we will not attempt to comment on it. In contrast, the record shows clearly that the permitted rate of return was equal to one percent plus the mortgage constant on the applicant's first mortgage.[19] Reliance upon the terms of the applicant's mortgage, rather than current financing terms, leads to inequitable results. For example, the Board ruled on two hardship applications in January, 1978, applying rates of return of 7.4% and 10.05%, based upon the applicant's mortgage constants. Had both been allowed to a 10% return, the first applicant would have received an additional $16,200. Even the borough's expert witness condemned this practice. We do not suggest that the permitted rate of return for all buildings must be equal. For example, rates of return might be adjusted to reflect different investment risks. Other jurisdictions have approved rate of return adjustments to encourage good building maintenance. See *Marshal House, Inc. v. Rent*

19. The mortgage constant is the percentage of the amount of the original mortgage debt which is equal to the annual payment for interest and amortization. For a conventional mortgage, repaid in equal periodic payments over the life of the mortgage, the mortgage constant will be slightly higher than the interest rate.

Control Board of Brookline, supra, 358 Mass. 686, 266 N.E.2d 876, 887 (1971). Similarly circumstanced landlords, however, must be treated alike. Discrimination based upon the age of mortgages serves no legitimate governmental purpose.[20]

We need not decide whether any single weakness of the Fort Lee hardship mechanism is dispositive. We are satisfied that the entire hardship structure, as administered by the Fort Lee Rent Leveling Board, could not afford landlords prompt and efficacious relief from widespread confiscatory effects of the 2.5% limitation. Plaintiffs have shown that such effects were foreseeable after December, 1976. Therefore, we hold the 2.5% limitation to be invalid as applied after December 31, 1976.

The unconstitutionality of the 2.5% limitation does not invalidate all of Ord. No. 74-32. We are satisfied that the 2.5% limitation is severable, leaving in effect the prohibition on rent increases in excess of the percentage rise in the CPI. *Cf. Inganamort v. Borough of Fort Lee, supra,* 72 N.J. 412, 421-24 (1977).

Our holding is based on the combined effects of the limitation on automatic rent increases and the hardship relief mechanism. Neither the 2.5% limitation nor the hardship mechanism was inherently unconstitutional. The inadequacy of the automatic rent increases, coupled with the Rent Leveling Board's inability to change base rents, altered the Rent Leveling Board's function. Instead of serving as a rarely used safety valve to relieve unusual

20. In fact, the Rent Leveling Board formula undercuts the legislative purpose of the rent control ordinances. By tying permitted return to the terms of the applicant's financing, the Rent Leveling Board encourages landlords to refinance their mortgages at higher interest artes. This leads to higher rents for tenants directly, to cover increased debt service, and indirectly, because the Rent Leveling Board will now allow the landlord a larger return.

financial pressures, the Rent Leveling Board was administering rents in an increasing fraction of Fort Lee's 10,000 rental units. This is hardly a job for a part-time board without professional staff.

One commentator summarized the case against rent control structures like Fort Lee's as follows:

> The failure of New Jersey cities to budget funds for the purpose of providing rent leveling boards with technical staffs has put local controls in a particularly bad light. Presently the local boards do not have sufficient expertise to understand the complexities of rent regulation and real estate finance. The draftsmanship of local legislation has left something to be desired. Ordinances are copied from the neighboring municipality or the Fort Lee ordinance without much input from those who are trying to administer the "model" ordinance. The ineptitude and uncertainty surrounding local rent legislation has provided strong arguments for a state law. * * * * Tenants who spend thousands of dollars a year in rent might consider legislation providing that tenants pay a fee of $10 to $15 per year for the purpose of providing rent leveling boards with some professional staff. [Baar, "Rent Control in the 1970's: The Case of the New Jersey Tenants' Movement," 28 *Hastings L.J.* 631 (1977)].

Many of these criticisms are well taken. On the other hand, we recognize that many municipalities will continue to rely upon unpaid volunteer Rent Leveling Boards. They may do so if the automatic increases permitted by their ordinances do not produce widespread confiscatory effects. Judicial review provides an adequate remedy for isolated instances of insufficient administrative relief. The courts, however, provide no substitute for a smoothly functioning rent control ordinance.

IV

Section 4 of Ordinance No. 76-8 repealed the real estate tax passthrough provisions of Ordinance No. 74-32, effective June 30, 1976. Plaintiffs in A-166-77, *New Jersey Realty Co. v. Fort Lee,* and A-164-77, *Americana Assoc. v. Fort Lee,* challenged Section 4 ("tax passthrough repealer") as denying them a just and reasonable return.

In 1976, under the then existing ordinance, Fort Lee tenants faced the prospect of absorbing a 30% property tax increase. The tax passthrough repealer shifted this burden onto the landlords.[21] From the landlords' perspective, the 1976 real estate tax increase was equivalent to roughly 4.5% of their rental income. Thus, the automatic 2.5% rent increase was palpably inadequate to cover the increment in real estate taxes, even if other operating costs remained constant. Among the older Fort Lee apartment buildings, net operating income in 1975 was comparable to that of 1973.[22] Without the uncollected portion of the 1976 tax passthrough, net operating income dropped in 1976 by more than 5% in 24 buildings, remained within 5% of the 1975 level in 8 buildings, and increased more than 5% in only 2. Net operating income fell by 10% or more in 16

21. The tax passthrough repealer was in some sense an interim measure. Thirty days after final disposition of the present appeal, a new rent control plan based on a flexible cost-related formula ("MAP") was to take effect. This formula contained a modified tax passthrough provision. Thus, Ordinance No. 76-8 did not contemplate indefinite suspension of a tax passthrough provision. Unfortunately, the ordinance made no provision for reviewing the effect of the repealer on landlords during the pendency of the appeal, which has already lasted two years. Further, there is no guarantee that the MAP ordinance will not be repealed or superseded before it takes effect. Therefore, we must consider the potential long-term effects of the tax passthrough repealer.

22. Net operating income in 1975 was within 5% of the 1973 figure in 9 buildings, was lower in 6 buildings, and was higher in 8.

of 34 buildings. Without the tax passthrough, future NOI would, of course, decline. See Section III *ante*.

We have already held that the 2.5% limitation *with* the tax passthrough was unconstitutional as applied after December 31, 1976. For the same reasons, the 2.5% limitation *without* the tax passthrough was immediately unconstitutional. Therefore, the tax passthrough repealer was void.

V

In the original trial in *New Jersey Realty Co. v. Fort Lee*, the court invalidated those portions of Ord. No. 76-8 which were to take effect "thirty (30) days following final and complete disposition of the appeal of the plaintiffs-appellants in the case of Harry B. Helmsley, et als. v. The Borough of Fort Lee, et als. ° ° °." The portions so condemned included the MAP formula for computing automatic rent increases. The borough cross-appealed from this ruling. A-167, *New Jersey Realty Co. v. Fort Lee;* A-165, *Americana Associates v. Fort Lee.*

On remand, the trial court summarized its rationale for invalidating these provisions: "The ruling was based upon a finding that the legislative intent was solely to repeal the tax surcharge provision and the rest of the language was merely camouflage." This finding cannot be reconciled with the plain meaning of the ordinance, which clearly embodied a revised rent control mechanism with a contingent effective date. The motives of the borough council in passing the ordinance are irrelevant to the validity of the measure, absent a showing of fraud, personal interest, or corruption. *LaRue v. East Brunswick Tp.*, 68 N.J. Super 435 (App. Div. 1961); *Kirzenbaum v. Paulus*, 57 N.J. Super. 80 (App. Div. 1959).

The contingent effective date, while unusual, is not unprecedented. Legislation, the effectiveness of which is conditioned upon the happening of a contingency, has generally been upheld. See, *e.g., City of Miami Beach v. Lansburgh*, 218 So.2d 519 (Fla. Dist. Ct. App. 1969), reh. denied 226 So.2d 821 (Fla. Sup. Ct. 1969) (municipal ordinance to take effect upon passage of bill pending in state legislature); *State v. Dumler*, 221 Kan. 386, 559 P.2d 798 (1977) (state statute to expire when federal restrictions on speed limits removed); *Bracey Advertising Co. v. North Carolina Dept. of Transportation*, 35 N.C. App. 226, 241 S.E.2d 146 (Ct. App. 1978) (state statute to take effect when state receives federal funds for implementation); *City of San Antonio v. Brady*, 159 Tex. 42, 315 S.W.2d 597 (1958) (state statute applied to city when population exceeded 10,000); 2 *Sutherland, Statutory Construction* §33.07 (4th ed. 1973). Our Court of Errors and Appeals upheld a statute whose effectiveness was contingent upon a referendum in *Hudspeth v. Swayze*, 85 N.J.L. 592 (1914). The Court termed contingent effective dates unobjectionable, and approved broad legislative discretion in enacting such measures:

> [I]t makes no essential difference what is the nature of the contingency, so it be an equal and fair one, a moral and legal one, not opposed to sound policy, and so far connected with the object and purpose of the statute as not to be a mere idle and arbitrary one. [85 N.J.L. at 599]

The statute which recently established a tax court, *N.J.S.A.* 2A:3A-1 *et seq.*, states specifically that it "shall take effect July 1 next following adoption of the constitutional amendment presently pending as Assembly Concurrent Resolution No. 38 . . . . " *N.J.S.A.* 2A:3A-1 note.

Fort Lee defends the delay in implementing the revised rent control scheme on grounds of practicality. It notes that an escrow fund had been established in connection with the *Helmsley* appeal. Landlords were permitted to collect rent increases equal to the percentage increase in the CPI if they placed increases above 2.5% in escrow. The borough argues that changing the formula for automatic increases while the *Helmsley* litigation was pending would have "create[d] mass chaos" and complicated administration of the escrow fund. We cannot say that postponing implementation of a new rent control structure until pending challenges to the old rent control system were resolved constituted an idle or arbitrary condition. The contingent effective date did not render any portion of Ord. No. 76-8 invalid.

Since we have determined that Section 4 of Ord. No. 76-8, the tax passthrough repealer, was invalid, we must determine whether the remaining sections were severable. Ordinance No. 76-8 contained a severability clause; thus, there is a rebuttable presumption of severability. Section 4 and the remaining portions of the ordinance were clearly independent, self contained legislative schemes. Notwithstanding the trial judge's characterization of the MAP plan as "camouflage" for the tax passthrough repealer, the evidence that the repealer was a significant inducement for adoption of the MAP plan is insufficient to overcome the presumption of severability. *Cf. Inganamort v. Borough of Fort Lee, supra,* 72 N.J. at 421-24. Therefore, the tax passthrough repealer is severable.

Since this opinion "final[ly] and complete[ly] dispos[es]" of the *Helmsley* appeal, all sections of Ord. No. 76-8 except section 4 will become effective in 30 days. Although the litigants have not addressed the substantive provisions of

Ord. No. 76-8, we offer a few brief observations on the MAP formula, which will replace the 2.5% limitation. The maximum annual percentage ("MAP") increase is composed of weighted adjustments for increases in operating costs, real estate taxes, and utility bills. The operating cost and utility adjustments are based on the "housing" and "gas and electricity" components of the CPI, respectively. The tax adjustment is based on the amount of taxes actually paid on an individual building. There is a fixed ceiling on annual increases of 6.5% for buildings in which the landlord pays for all utilities, and 5% in other buildings. A landlord may carry over to the next year increases in excess of the ceiling, but the carryover is subject to the next year's ceiling.

The MAP scheme, unlike the 2.5% limitation, attempts to relate rent increases to landlords' increased costs. Obviously, the effectiveness of the MAP formula depends upon how closely its adjustments approximate actual costs. Nevertheless, the MAP scheme appears to be a more balanced compromise of tenants' and landlords' interests. Tenants are protected from unjustified rent increases, but landlords are permitted to pass through reasonable increases in expenses. Similar cost-related increase formulas were applauded by most of the expert witnesses. The Public Advocate also recommended cost-related formulas as the fairest and easiest to administer a rent control system.

The fixed ceiling in the MAP ordinance deviates from a pure cost-related approach. Nevertheless, it differs in several respects from the 2.5% limitation. First, the 5.0-6.5% ceiling may not be so low that most landlords' NOI will decrease annually. Second, the carryover provision offers some means for landlords to recover from unusually large cost increases in a single year. Third, the formula recognizes some financial distinction between buildings in which the landlords and tenants, respectively, pay utility bills.

The MAP ordinance is far from perfect. If the rate of inflation accelerates, the fixed ceiling may prove to be too low. The carryover provision coupled with the ceiling may not suffice if unusual cost increases occur in successive years. Further, no attempt has been made to reduce long-term reliance on hardship relief once it is needed. There is no provision for revising the base rents to which the MAP increase is applied. Nor is there any means of keeping the MAP current. The various adjustments for a calendar year are computed using data from the preceding October. Thus, the adjustments will be more than a year out of date for November and December leases. Since the adjustments are based on an index which is published monthly, it is not clear why a lag of this magniture should be built into the ordinance. Notwithstanding these and other questions, the MAP plan appears to be an improvement over its predecessor.

The MAP ordinance also limits rent increases for tenants 62 or more years old to 80% of the formula rate. Ord. No. 76-8 § 3 ¶ 2.7. This provision is indistinguishable for constitutional purposes from the rent freeze for senior tenants we invalidated in *Property Owners Ass'n v. Tp. of North Bergen*, 74 N.J. 327 (1977). There, no automatic rent increases could be imposed on tenants 65 or more years old whose incomes were less than $5000. If a landlord qualified for hardship relief, he could increase senior tenants' rents up to 10%. We concluded that under the North Bergen ordinance the landlord or the other tenants were forced to subsidize the senior tenants unconstitutionally. Under the Fort Lee senior tenant provision, landlords are denied 20% of an otherwise permissible rent increase. As in North Bergen, either the landlord or the other tenants will have to supply the income lost from senior tenants.

Finally, we note that plaintiffs alleged that Ord. No. 76-8 was invalid because its passage was tainted by a conflict of interest. Members of the borough council who were tenants, according to plaintiffs, had a direct financial interest in the passage of the tax passthrough repealer which rendered improper their consideration of the ordinance. A disqualifying personal interest, however, is "one which is different from that which the public officer holds in common with members of the public." *Aldom v. Borough of Roseland*, 42 N.J. Super. 495, 507 (App. Div. 1956). The tenant-councilmen's interest in the tax passthrough repealer was no different from a homeowner-councilman's interest in the property tax rate. Both are shared with large segments of the population, and are not likely to tempt a councilman to serve his own ends to the detriment of his constituents.

Similarly, plaintiffs' attempt to disqualify the tenant-councilmen by reason of bias must fail. In *Wollen v. Fort Lee*, 27 N.J. 408 (1958), we upheld the rezoning of a 44-acre tract for multiple-family dwellings against a similar challenge. Three of the victorious candidates in a recent councilmanic election had campaigned in favor of the rezoning. We found no improper bias in their official actions. Instead, we stated:

> But this is the democratic process; and it would be contrary to the basic principles of a free society to disqualify from service in the popular assembly those who had made pre-election commitments of policy on issues involved in the performance of their sworn legislative duties. Such is not the bias or prejudice upon which the law looks askance. There is no showing that the minds of these councilmen were not open to conviction in the just fulfillment of what they severally conceived to be a solemn obligation to the community. Otherwise, representative democracy would be subverted, and local self-government denied. [27 N.J. at 421]

VI

On remand, the trial court found that vacancy decontrol [23] must be implemented in Fort Lee. This ruling effectively invalidated provisions in Ord. No. 74-32 and Ord. No. 76-8 which state that vacancies do not affect application of rent control to a unit. As the parties' briefs demonstrate, numerous arguments can be marshalled for and against vacancy decontrol. Resolution of this debate is clearly a legislative function. There is no basis on this record for invalidating the municipality's explicit rejection of vacancy decontrol and the trial court ruling to the contrary must be reversed.

VII

To summarize, we have held (1) the 2.5% limitation of Ord. No. 74-32 was unconstitutional as applied after December 31, 1976; (2) the tax passthrough repealer, section 4 of Ord. No. 76-8, was invalid; and (3) the remaining sections of Ord. No. 76-8 were not invalid and were severable from section 4. Those landlords who participated in the escrow arrangement will, of course, have recourse against moneys deposited after June 30, 1976, the effective date of the tax passthrough repealer. Since the conclusion of this appeal eliminates the need for the escrow fund, it should be distributed promptly. We make no order concerning the disposition of the fund, however, because some depositors in the escrow fund are not parties to this litigation.

Our analysis of the ordinances in this case may appear to be unorthodox. Usually, the validity of legislation and

23. Under vacancy decontrol, rent controls are removed once an apartment becomes vacant. Modified forms of vacancy decontrol permit a landlord to lease the unit for a higher rent, after which the unit is again subject to controls.

its administrative implementation are considered separately. As we said earlier, see section III *ante*, a continuing economic regulation like rent control has unusual confiscatory potential. If rent regulation is based upon assumptions about future economic trends which prove to be incorrect, landlords may sustain lower profits than intended. This situation will continue until the regulation is revised. Even if the landlord later receives full compensation, it will have lost the temporary use of the money. More important, even a temporary failure to correct for a sudden, severe economic change (*e.g.*, the rise in fuel prices during the Arab oil embargo) may lead to cash flow problems for landlords.[24] Finally, a workable standard for confiscation has proved to be elusive.

Regulatory delay and the exact definition of confiscation have little practical impact so long as landlords are not dependent upon administrative relief. If, however, the automatic rent increases permitted under a rent control ordinance are disproportionately low, the theoretical rent structure embodied in the ordinance becomes irrelevant. Instead, landlords' income is now determined by the administrative implementation of the ordinance. A fair and efficient administrative relief mechanism can theoretically provide constitutional returns to landlords even under an ordinance with stringent limitations on automatic rent increases. Thus, in practice the effects of the automatic increase provisions in the ordinance and the hardship relief mechanism cannot be separated.

The foregoing analysis should make it clear that a municipality can constitutionally enact rent control ordinances with stringent controls like Fort Lee's. If it does so,

24. One might argue that the landlord of an uncontrolled building would be equally vulnerable to crises, since his income is determined by long-term leases. Such a landlord, however, can resonably be expected to have a greater profit cushion than the landlord of a rent controlled building.

however, it must be prepared to protect landlords' interests by providing prompt, fair, and efficacious administrative relief. Conversely, if a municipality is not prepared to support a sophisticated administrative relief system, it must adopt a more moderate rent control scheme, one which does not attempt to keep landlords' returns at the constitutional minimum. Obviously, such a scheme must at least be calculated to cover reasonable increases in landlords' operating costs without lengthly administrative proceedings.

We have refrained deliberately from formulating a numerical test for confiscation. The concept of a minimum constitutional return is a theoretical tool, not a measurable quantity which can be fixed with precision. Judicial review of rent control measures is limited to determining whether the return permitted by an ordinance falls above or below this theoretical dividing point. *Cf. Zussman v. Rent Control Bd. of Brookline,* 359 N.E.2d 29, 32-33 (Mass. Sup. Jud. Ct. 1976).

Rent control implicates complex economic, social, and political issues. The states legislature is better equipped than most municipalities to formulate a comprehensive approach to this delicate problem. In conclusion, we endorse the New York Court of Appeals' discussion of legislative and judicial roles in rent regulation:

> This appeal has involved difficulties rarely confronting a court. The patchwork of rent-control legislation in recent years has created an impenetrable thicket confusing not only to laymen but to lawyers. Most important, under legitimate political pressures and the stress of economic and social tensions, the rational resolution of policy considerations vital to the well-being of the people in the City of New York have been handled on a day-to-day basis, and often by temporary makeshifts. As a consequence, the legislation contains

> serious gaps, not readily filled by interpretation based on intention, because there was none, or even by judicial construction to make reasonable and workable schemes that are self-abortive as designed. There is a limit to which courts may or should go in rectifying such statutory gaps. Because of the significant policies involved, they should be resolved by legislative action at the local or State level. At stake is the conservation of needed housing, the well-being of the residents of the city, and the according of respect to the property interests of building owners. * * * *
>
> Under the circumstances, the courts below and this court have endeavored to do what they can to correct a troubled situation. Ultimate resolution requires correction at the legislative level, State or local, and not at the judicial level. The courts have limited access to the controlling economic and social facts. They are also limited by a decent respect for the separation of powers upon which our system of government is based. [89 *Christopher Inc. v. Joy,* 35 N.Y.2d 213, 360 N.E.2d 612, 618, 318 N.E.2d 776, 780-81 (1974)]

The judgment of the Law Division in *Helmsley v. Fort Lee* is modified as set forth above. The judgment of the Law Division in *New Jersey Realty Co. v. Fort Lee* and *American Assoc. v. Fort Lee* is reversed.

For modification in Helmsley and reversal in New Jersey Realty Co. and Americana Assoc.—Chief Justice HUGHES and Justice MOUNTAIN, SULLIVAN, CLIFFORD, SCHREIBER and HANDLER—6.

Opposed—None.

APPENDIX B

PETITIONS FOR CERTIFICATION

HARRY B. HELMSLEY v. BOROUGH OF FORT LEE.

July 21, 1977. Petition for certification is granted and the judgment of the Appellate Division is summarily reversed; and it is further ordered that the cause is remanded to the Superior Court, Law Division, which is directed to hear and determine by a further plenary hearing the limited issue of "just and reasonable return"; and it is further ordered that the parties shall be afforded the opportunity to present additional evidence in the light of *Hutton Pk. Gardens v. W. Orange Town Council*, 68 N.J. 543 (1975); *Troy Hills Village v. Parsippany-Troy Hills Tp. Council*, 68 N.J. 604 (1975); *Brunetti v. Borough of New Milford*, 68 N.J. 575 (1975); and any further amendments to the rent control ordinance including No. 76-8, adopted June 30, 1976, as to which appeals are pending and as to which separate orders are entered this day; and it is further ordered that a pretrial conference be held pursuant to a schedule set by the trial judge, which proceedings shall be held and conducted with due diligence in conformity with this order, and that forthwith upon the conclusion of all such proceedings, the trial judge shall file with the Clerk of the Supreme Court a report as to his findings and determination with respect to the matters referred to above, such filing to be no later than October 15, 1977; and it is further ordered that the stay provided in the order of April 1, 1976 be continued until the further order of the Court and that jurisdiction be retained.

NEW JERSEY REALTY COMPANY v. BOROUGH OF FORT LEE.

July 21, 1977. Certification to the Superior Court, Law Division is granted; and it is further ordered that the cause is remanded to the Superior Court, Law Division, to conduct a plenary hearing in accordance with the directions given by this Court in the matter of *Harry B. Helmsley, et al. v. Borough of Fort Lee, et al.* (C-760-76), which order has been entered this day, to the end that the decision in this matter be reconsidered together with that in *Helmsley* and *Americana Associates v. Borough of Fort Lee* (A-2974-76); and it is further ordered that jurisdiction is retained.

AMERICANA ASSOCIATES, A LIMITED PARTNERSHIP v. BOROUGH OF FORT LEE.

July 21, 1977. Certification to the Superior Court, Law Division is granted; and it is further ordered that the cause is remanded to the Superior Court, Law Division, to conduct a plenary hearing in accordance with the directions given by this Court in the matter of *Harry B. Helmsley, et al. v. Borough of Fort Lee* (A-2515-76); and it is further ordered that jurisdiction is retained.

APPENDIX C

FINDINGS AND DETERMINATIONS

SMITH, HARVEY J.C.C. (temporarily assigned)

This chapter of the Fort Lee rent control saga takes place along the razor's edge which separates stringent goveremental regulation from unlawful confiscation. Specifically, the issue is whether two rent control ordiances, adopted 20 months apart, are confiscatory in that they prevent Fort Lee landlords from obtaining a "just and reasonable return." Both measures have been previously upheld by this Court as a proper exercise of municipal police power. Today, following a Supreme Court mandated supplemental hearing, we reconsider their constitutionality as applied.

THE HISTORY

Fort Lee experienced a tremendous growth in population from 1960 to 1972. While other Bergen County municipalities severely limited construction of multi-family dwellings, large high rise complexes were permitted in the Borough. According to statistics compiled by the local Building Inspector's Office, approximately 5900 new apartment units were built in Fort Lee during that period of time. By the early 1970's, apartment dwellers outnumbered homeowners and tenants emerged as a dominant political force.

Not surprisingly, on January 5, 1972 the governing body determined that rent gouging in multi-family dwellings disturbed the housing market and created an emergency. To remedy this dilemma, Ord. No. 72-1, which prohibited rent rises at a percentage greater than the rise in the Consumer Price Index (hereinafter CPI), was adopted. On

April 5, 1973, the New Jersey Supreme Court sustained the Borough's legislation and held rental increases to be a proper subject of municipal regulation. *Inganamort v. Fort Lee*, 62 N.J. 521 (1973) (*Inganamort I*)

During the odyssey of *Inganamort I*, from the Fort Lee Council's chambers to the New Jersey Supreme Court, Ord. No. 72-1 remained intact. However, once its right to legislate in this sphere was assured, the governing body began to make changes. Several amendments were adopted by both ordinance and resolution. In May 1974 the Mayor and Council replaced the fluctuating scale approach with a flat rate (2½%) increase permissible during a calendar year. Ord. No. 74-26. On December 18, 1974 this Court ruled that the original rent control ordinance (No. 72-1) had expired by its own terms in February 1973 because an extension attempted by resolution was procedurally defective. From February 1973 to November 1974, Fort Lee was without rent control until the Supreme Court reversed that holding. *Inganamort v. Fort Lee*, 131 N.J. Super. 559 (Ch. Div. 1974), rev'd 72 N.J. 412 (1977) (*Inganamort II*). But even before the Chancery Division decision was announced, a new ordinance had been promulgated.

On November 6, 1974 Fort Lee Ord. No. 74-32, one of the two regulations we consider today, became law. It prohibited rental increases greater than 2½% but allowed additional compensation to landlords for rising real estate taxes and capital improvements. On June 30, 1975, following a plenary trial, this Court sustained the validity of that regulation. The landlords' proofs, based upon inflated and unrealistic replacement costs, failed to show confiscation or deprivation of a fair rate of return and, therefore, did not overcome the presumption of validity afforded to municipal ordinances. In this setting Ord. No.

74-32[1] was found to be facially constitutional and was launched on its way to the Supreme Court.

Although real estate taxes remained relatively stable, potential increases were contemplated from the very beginning. Ord. No. 72-1 had given landlords the right to seek a tax surcharge for increases over the 1972 base year in addition to the maximum permissible rent. This provision was carried over into the 2½% ordinance. It remained in effect until invalidated by *Helmsley* because increases applicable to common areas were not encompassed. Ord. No. 75-45 was thereafter enacted which corrected the defect and set 1974 as the base year. Appreciable real estate tax increases above the 1974 base were not contemplated by the municipal governing body when Ord. No. 75-45 was enacted.

Then in May 1976 the Bergen County Tax Board announced the tax rate for Fort Lee. The voting public became aware that the apartment house real estate tax dollar increase over the 1974 base would amount to roughly $2,000,000. Under existing law, the full amount of increase could be passed through to the tenants. Many individuals faced large surcharges and real estate taxes suddenly became a topic of major concern to municipal legislators.

Ord. No. 76-8, the second measure we reconsider today, was voted upon during the June 28, 1976 meeting of the Mayor and Council. It was ostensibly a complete revision of Fort Lee's rent control scheme. The 2½% flat rate was discarded and a new fluctuating scale substituted. The new yardstick consisted of a formula for computing automatic rent increases based upon weighted percentage increases of certain components of the CPI and additional taxes actually paid to the Borough. It provided automatic increases of 5% for buildings in which tenants paid utilities and 6.5% for single-metered buildings. For the first time apartments were separated into classes and vacancy decontrol appeared on a limited basis. However, all of these sweeping reforms were to take effect: "* * * thirty (30) days following final and complete disposition of the appeal of the plaintiffs-appellants in the case of *Harry B. Helmsley, et als. v. The Borough of Fort Lee, et als.*, Superior Court of New Jersey Docket No. L-11348-74". On the other hand, the tax surcharge section of Ord. No. 75-45 was repealed, effective immediately. When the smoke cleared, the only operative effect of Ord. No. 76-8 was to shift the real estate tax burden from tenants to landlords.

1. Actually rental increases are tied to the CPI, but in no event may they exceed 2½%. This regulation may be referred to as the 2½% ordinance. The suit attacking its validity is *Harry B. Helmsely, et al v. Borough of Fort Lee, et al*, Superior Docket #L-11348-74 P.W., (hereinafter *Helmsely*).

On January 31, 1977 this Court nullified all the provisions of Ord. No. 76-8 except for the tax surcharge repealer. The ruling was based upon a finding that the legislative intent was solely to repeal the tax surcharge provision and the rest of the language was merely camouflage. All plaintiffs' proofs were directed at the amount of additional real estate tax dollars assessed to them and no other significant financial data was furnished. Ord. No. 76-8 was sent on its way through the appeal process.[2]

On July 21, 1977 the *Helmsley* petition for certification was granted and *N.J. Realty* was certified directly from the Law Division.[3] Both cases were consolidated and

2. Ord. No. 76-8 may be referred to as tax surcharge repealer. The suit attacking its validity is *New Jersey Realty Company, et al, v. Borough of Fort Lee, et al*, Superior Court Docket #L-42926-75 P.W., (hereinafter N.J. Realty).

3. *American Associates, a limited partnership v. Borough of Fort Lee, et al*, Docket #A-2974-76, was certified by the Supreme Court at the same time. It had been consolidated for trial with *N.J. Realty*.

remanded for further factual findings and reconsideration. For the third time in five years Fort Lee rent control ordinances had reached the Supreme Court.

While the subject cases were traveling the appellate path, decisions were handed down in *Hutton Park Gardens v. West Orange Town Council*, 68 N.J. 543 (1975); *Brunetti v. Borough of New Milford*, 68 N.J. 575 (1975) and *Troy Hills Village v. Parsippany-Troy Hills Tp. Council*, 68 N.J. 604 (1975). Although each case deals with a different aspect of rent regulation, they form an integrated unit widely known as "The Trilogy" (hereinafter *Trilogy;* individual cases, *Hutton Park, Brunetti* and *Troy Hills*). None has the voluminous factual record which has been developed during this remand. We now reconsider the Fort Lee rent control mechanism from a constitutional viewpoint based upon the application of *Trilogy* principles to the newly acquired evidence.

RENT CONTROL IN FORT LEE TODAY

History has taught us that Fort Lee's governing body considers the protection of its tenants-in-residence a matter of primary importance. Innovative measures have been developed in its continuing effort to limit rental increases the fullest permissible extent. Landlords have stubbornly resisted by litigating each paragraph, sentence and punctuation mark of every rent control regulation. Ordinance amendments, invariably followed by law suits, have made judicial determinations merely part of a never ending cycle. A substantial portion of the latest enactment although held to be invalid, would have automatically become effective 30 days after Supreme Court determination of the cases at bar. As a result, the amount of legal rent chargeable has remained a legitimate subject for debate years after the fact. In 1977 *Inganamort II* determined 1973 rents.

The year 1978 finds rental disputes ranging as far back as 1974 still in the process of litigation.

The extent of confusion generated by this legislation-litigation carousel can be gleaned from the record in *N.J. Realty*. When the 1976 real estate tax rise was heralded in midyear, it touched off this chain of events:

> Landlords hastily dispatched bills for the entire 1976 tax surcharge.
>
> Tenants communicated their alarm to the members of the Fort Lee governing body.
>
> The Mayor and Council enacted the tax surcharge repealer on June 28, 1976. During the Council Meeting a councilman advised the overflow crowd and television audience not to pay tax surcharge bills until ordered by the Court.[4]
>
> Landlords asserted that the ordinance, if effective at all, could not become operative until 1977 and pressed for payment.
>
> Tenant leaders insisted that the surcharge repealer had retroactive effect and landlords were not entitled to any tax surcharge for 1976.
>
> Landlords promptly instituted suit against the Borough.
>
> Hordes of tenants, threatened with both eviction and peer group rejection, sought advice. A Rent Leveling Board member attached an answering device to his telephone which delivered a message from his wife advising inquiring tenants not to pay.

4. The meeting was broadcast locally on closed circuit television as an event of public interest. A videotape of a portion of it has been viewed by the Court.

Landlords sought a court order restraining use of the recording device.

The Office of the Public Advocate entered a court appearance to protect the wife's First Amendment rights.

The Fort Lee Tenants Association intervened on behalf of tenants.

Landlords asserted a claim against the Fort Lee Tenants Association for tortious interference with their contractual rights.

Landlords instituted numerous summary dispossess and small claims actions in the Bergen County District Court against nonpaying tenants.

Resolution of these disputes still abides final determination of these proceedings.

Although all of the approximately 9000 Fort Lee apartment units are affected by such ordinance revisions, a similar scenario is played on a lesser scale when individual hardship exceptions are sought. Rent Leveling Board decisions travel the same judicial appellate path as ordinances. Uncertainty reappears each month as new rent payments become due. To maintain stability while appeals are being processed through the court system, trial courts resort to the use of escrow funds. The largest of these funds was created subsequent to the *Helmsley* decision. Landlords were permitted to collect rental increases up to the full extent of the rise in the CPI on condition that they deposit the excess over 2½ with a court appointed trustee. By October 1, 1977, $2,534,915.24 had been paid into the fund by the owners of 5525 units.

Another integral part of the presents state of flux is the real estate tax problem. Current year Fort Lee apartment

assessments amounting to $192,000,000 are on appeal to the Bergen County Board of Taxation. Tax appeals involving additional millions of dollars and stretching as far back as 1973 still await determination by the State Division of Tax Appeals. As long as the amount of real estate taxes remains in doubt, it is impossible to accurately determine net return.

The Fort Lee construction boom of the 1960's has ground to a complete halt. While undeveloped lots zoned for high rise remain vacant, no apartments for residential purposes have been built since 1972. A two year building moratorium, high construction costs, the vicissitudes of the economy and rent control have all contributed to this stagnant condition. The extent to which rent control has been a factor will depend upon one's point of view after evaluation of the facts that follow.

THE 2½% SOLUTION

The 2½% annual limitation on rental increases had it genesis in early 1974 at a series of meetings between tenant leaders and members of the Fort Lee governing body. Depositions filed in *Helmsley* indicate that it was first proposed by the Fort Lee Tenants Association. The Council was persuaded that the CPI was no longer an appropriate tool for measurement of increased housing costs. Because many operating costs were fixed and unaffected by inflation, it was felt that 2½% would adequately compensate landlords and protect tenants. Throughout all the years of litigation, the municipality has never submitted any evidence to show that 2½% was based upon any legislative findings. Instead, it has rested upon the presumption of validity and defied landlords to prove the regulation confiscatory. *Troy Hills, supra,* 68 N.J. at 570.

Once again landlords were confronted with the heavy burden of proving municipal regulation to be capricious.

To this end, Moses Sternlieb, a certified public accountant, experienced in real estate matters, was retained to gather and categorize financial information. Detailed responses to his inquiries were supplied by 35 owners of 7542 units, representing about 85% of all apartments subject to the Fort Lee ordinance. Since the remand hearing took place in 1977, complete financial data for that year was not yet available. Information was furnished for the years 1970-76. It consisted of financial statements, income tax returns, W-2 forms, mortgage statements and real estate tax bills. To attain uniformity, all property owners completed the same Department of Housing and Urban Development (hereinafter HUD) profit and loss statement form. Landlords who had applied to HUD for preemption or to the Rent Leveling Board for hardship relief also supplied copies of their files.

Although the Sternlieb report provides many extrapolations, adjustments, averages and projections, it contains accurate and useful underlying raw figures. Even a cursory examination of this document reveals a great disparity among buildings. Differences in age, financing and utilities, as well as building type, muddy the waters. Mr. Sternlieb divided the apartments into separate categories: high rise (6 stories or more), low rise and garden apartments. He selected one particular structure in each of the three categories as typical and used it as the basis of explanatory testimony. I have chosen one of them to use for illustrative purposes. Its financial history is relatively free from distortions and unexplainable peaks and valleys. The single building example permits use of raw data rather than misleading averaged and adjusted figures.

The representative building selected is Mediterranean Towers I. It was proffered by Mr. Sternlieb in this vein and accepted as such by all parties. It is a luxury high

rise as are two-thirds of all Fort Lee apartments buildings. Construction was commenced in January 1964 and a certificate of occupancy was granted in August 1966. Financing consists of an institutional 37 year permanent mortgage executed in 1969 with a 5.25 interest rate. It is efficiently run and when vacancies occur, they are filled from a waiting list. It has neither applied to the Rent Leveling Board for hardship relief nor sought HUD preemption. In *Helmsley*, its owners avoided production of books and records despite the municipality's extensive efforts to obtain them.[5]

It was in 1974 that the 2½% ordinance became law. We begin our statistical analysis with operating costs as they affect Mediterranean Towers I, during that general time period.

5. There are three different Mediterranean Towers complexes: Med. I (483 units); Med. II (483 units) and Med. West (507 units). All are owned by the same entity. John Inganamort, the managing partner, is a most litigious individual but when faced with "Hobson's Choice" of disclosure or withdrawal as a plaintiff in *Helmsley*, the latter course was taken.

	1973	1974	1975	1976
OPERATING EXPENSES	805,442	950,423	1,008,371	1,151,100
Yearly % increase	—	18	7	14
% over 1973 (Cash items of operation not including depreciation or debt service)	—	18	25.2	43
UTILITIES*	109,574	193,292	194,142	199,278
% over 1973 (Oil, electricity and gas)	—	76.4	77	82
REAL ESTATE TAXES*	309,335	316,987	359,012	199,682
Yearly % increase	—	2.5	12	33
% over 1974	—	—	12	50

* Part of operating expenses

The impact of the 1973 Arabian oil embargo affected the real estate apartment industry in 1974. Typically for that year, Med. I suffered a 76.4% increase in utility costs and an overall 18% rise in its operating expenses. Fort Lee's governing body determined that 2½% would adequately compensate landlords the very same year. Once these costs leveled off, taxes skyrocketed. In 1976 Fort Lee real estate taxes increased 33% over the prior year and 50% over 1974. While operating expenses rose 43% from 1973 to 1976, the 2½% limitation on rental increases was made even more restrictive to landlords by enactment of the tax surcharge repealer. It is not reasonable to anticipate future increases of this magnitude but it is unrealistic to prognosticate annual operating cost increases of only 2½%. All of the overwhelming and unrefuted evidence demonstrates that there was never a factual basis to justify imposition of the 2½% limitation.

The next hurdle was placed in the path of the landlords by Justice Pashman:

> We note that the rent increase formulae chosen by defendants in the instant case are superimposed upon base rents that the landlord selected. It is conceivable that, when first selected, these base rents yielded an exorbitant or unreasonably high profit return. Permitting a landlord under these circumstances to pass on to his tenants all increases in costs or a percentage increase equal to 100% of the CPI would simply perpetuate the recovery of exorbitant rents. Therefore, at least in some instances, rent increase formulae which limit rent increases to an amount less than the percentage increase in the CPI may be not only rational but may be necessary if rent control is to protect tenants from unjust and exorbitant rents. *Hutton Park, supra,* 68 N.J. at 574-574.

Joseph Sopher, a New York Rental Agent, was called in the attempt to clear this obstacle. He is the exclusive rental agent for approximately 8000 Fort Lee apartments and his involvement in the Borough dates back to the mid 60's. His office has handled rentals for Med. I since its construction. According to his testimony, massive production of apartments in Fort Lee made high rises extremely difficult to rent. Most of the initial tenants had to be lured across the George Washington Bridge by promises of concessions and inventive marketing techniques.

Joseph Sopher was also an active participant in determining the amount of original rents:

> ° ° ° New York has been faced with a tremendously escalating rent problem, and a lot of these people found when we presented them with the area of Fort Lee that they could live here for *almost 50 percent less than they were paying in New York* and still not be that far away from their offices and other places of importance in the city. (Emphasis supplied) (T-858).

Med. I's original tenants received three year leases without annual rent increases. When it was time for renewal, they were offered an additional three years at the same rent for a total of six years without an increase.

John Bailey, Senior Vice President of Landauer Associates, Inc., and a well known real estate consultant, testified next. He compared the pre-rent control Fort Lee market with bedroom suburban areas of Philadelphia and Chicago because income producing properties are evaluated on a national rather than local basis. Although there are some variations that make Fort Lee a peculiar market, it has many characteristics found in other areas. He opined that pre-rent control Fort Lee was a market in relative equilibrium with the supply of apartments approximately equaling

the demand. Based upon experience, he concluded that Fort Lee rentals in the early 1970's were generally fair and that Med. I was on the low side of a reasonable range. Its chart of net rental income verifies his position:

		Increase	
	Rental Income	Dollar	Percentage
1970	$1,903,684	———	—
1971	1,946,386	42,702	2.2
1972	2,083,609	137,223	7.
1973	2,110,030	26,421	1.3
1974	2,160,968	50,938	2.4
1975	2,239,755	78,787	3.6
1976	2,271,224	31,469	1.4

There is no claim here that rents were suddenly escalated in a race against the effective date of newly imposed controls. See *Woodcliff Management v. North Bergen*, 127 N.J. Super. 123 (Law Div. 1974). Undoubtedly there have been isolated incidents of exorbitantly high increases but this can hardly be considered a pattern of rent gouging. The unrebutted facts as presented indicate the rate of increase is extremely modest compared to rapidly accelerating costs of operation. This is graphically depicted by comparing Med. I's recent dollar rent and operating cost increases. Since it is a participant in the *Helmsley* escrow fund, the impact of the ordinances can be further evaluated:

	Income Increase	Income with Escrow	Operating Costs Increase
1974	$50,938	———	$144,981
1975	78,787	$124,835	57,948
1976	31,469	157,924	142,729

More relevant evidence is found in the language of the tax surcharge repealer ordinance which purported to allow

automatic rental increases of up to 6½%. Finally, the Public Advocate, who intervened on behalf of tenants, after an evaluation of the evidence, recommended that an automatic increase of more than 2½% be granted in Fort Lee on policy grounds. All this makes it abundantly clear that the automatic 2½% increase is merely a token and the regulation tantamount to a rent freeze.

Now is an appropriate time for us to leave Fort Lee and travel to the mythical Kingdom of Camelot. Consider a building capable of producing this financial statement:

	Operating Profit	Dstributions
1973	$352,650	$635,000
1974	268,038	19,354
1975	363,567	489,090
1976	283,938	650,000

The apartment house yields a steady profit after payment of operating expenses and debt service. Its healthy cash flow permits the owner to withdraw and distribute substantial sums of money. Not only is it maintained superbly but tenants pay extremely reasonable rents. All of this could only happen in Camelot; never in rent-controlled Fort Lee. But the impossible dream is true and the building is really Med. I. This shows that prudent investors can reap large profits while supplying decent shelter at reasonable prices. Most Fort Lee apartment builders of the early 1960's were very succesful as pointed out by Med. I's positive cash flow and profit picture.[6]

However, not all landlords are that fortunate. The Colony (484 units) rests firmly in the hands of the receivers. Hampshire House (202 units) has been in and out of bankruptcy court. Crystal House (128 units), Carriage House (292 units), North Bridge (280 units), Imperial House (55 units), Horizon House (1260 units), The Riviera (35 units) and Part Terrace Apartments (20 units) have already applied for HUD preemption and/or Rent Leveling Board hardship relief. Med. West (507 units), built in the early 1970's, is in dire straits despite having already received HUD preemption, hardship relief and probably some of Med. I's cash distributions. It provides reasonable services to tenants only because the mortgagee has granted a moratorium on payment of mortgage principal and reserve for replacement.

6. These statistics are probably the reason landlords have been reluctant to produce books and records.

The line is forming outside the Fort Lee Rent Leveling Board. New luxury high rises have already queued up. Most of the older high rises will be next followed by low rises and finally garden apartments. If the 2½% limitation remains in effect, the number of hardship exceptions will soon exceed the units subject to its strict application. Eventually every apartment building, including Med. I, will not be able to function without a hardship increase.

This brings us cheek by jowl to the issue of whether the ordinances in question pass constitutional muster solely because they provide the opportunity to apply for administrative relief.

HARDSHIP AND FAIR RETURN

Early rent control ordinances centered upon the extent to which rental increases could be limited and paid little attention to problems of administration. While many municipalities did not even create a regulatory agency, Fort Lee established a Rent Leveling Board (hereinafter RLB) from the very beginning. It consisted of five members authorized to act only in an advisory capacity. None of its actions were deemed to be final until approved by the governing body. Ord. 72-1, Sec. 11.

In 1974 the old RLB was dissolved and a new one, consisting of seven members, created. It was granted all powers necessary and appropriate to carry out and execute the purposes of the rent control ordinance. Determinations became adjudications and aggrieved parties were afforded the right to appeal to the governing body. For the first time, a crude form of hardship provision was incorporated into the ordinance. The RLB could grant hardship increases if it found that landlords were unable to meet mortgage payments, taxes and current operating expenses. Ord. 74-32, Sec. 10.

In June 1975 the Fort Lee Ord. 75-74 embellished the rudimentary standards for guidance of RLB in the evaluation of hardship:

> In determining the inability of the landlord to earn a fair and reasonable return upon his investment in the dwelling such as to justify the hardship increase, the Rent Leveling Board shall consider the following factors:
>
> (a) taxes;
>
> (b) costs of maintenance and operation of the property;
>
> (c) the kind, quality and quantity of the services being furnished or withheld by the landlord;
>
> (d) the number and frequency of prior hardship or capital improvement increases for the dwelling;
>
> (e) the landlord's original and current investment;
>
> (f) the dates, amounts, terms and interest rates of all past and current mortgages on the dwelling;
>
> (g) the amount of current professional and management fees and the relation, if any, between the landlord and the recipients of such fees;

> (h) the age of the dwelling; as well as its original and current appraised value;
>
> (i) the present and past rates of vacancy in the dwelling;
>
> (j) the efficiency of current management;
>
> (k) cash flow history, prior to the enacement of rent leveling, to present;;
>
> (l) other factors which the Board, through its experience, shall determine to affect the rate of return. Ord. 75-45, Sec. 2.

Thus the Mayor and Council, having created a regulatory agency to carry out their stated legislative purpose, supplied these detailed ordinance standards to instruct appointive board members in the performance of delegated duties. Moreover, all RLB rulings were subject to review by the governing body. On the surface, Fort Lee's rent control mechanism presented impeccable constitutional credentials. Reality was a different matter.

The very first appeal by a high rise apartment from an RLB denial of hardship was disposed of by a letter from the Borough Attorney:

> This is to acknowledge receipt of your notice of appeal from the determination of the Rent Leveling Board with respect to this matter.
>
> The Mayor and Council have instructed me to advise you that by reason of the length of the transcript, the complexity of the issues and the press of legislative business, it will be impossible for the Governing Body to hear this appeal within the time limits prescribed by Section 16 of Ordance No. 74-32. Under these circumstances, and because the matter in question is an application for a hardship increase, the Mayor and

> Council do not wish to delay you in pursuing such redress that you may wish to seek in the courts. Therefore, you should consider that the determination of the Rent Leveling Board has become final and you are free to pursue your further remedies.

RLB hardship rulings have never been reviewed by the Mayor and Council. This aspect of administrative procedure has been abandoned.

Left without supervision, the RLB adopted its own formula for determination of fair reurn.[7] It was derived neither from ordinance standards nor the *Trilogy* but was arrogated from the opinion testimony of a real estate expert who had testified before the RLB on behalf of a hardship applicant. The Board was impressed with his approach and, without formal enactment of a regulation, adopted it as the basis for judging future applications. Although his remarks were taken out of context, the RLB standard today is that a landlord is entitled to receive 1% over the mortgage constant on investment. Less than that is said to deprive him of a fair and just return.

The investment upon which a landlord is entitled to a return is simply defined as cash contributions less withdrawals. This can only be ascertained through a complete examination of financial transactions. When La Cross House was considered in August 1977, the RLB went back ten years and found:

> Adequate proof was not presented to clearly define the applicant's investment in the project. Various inconsistent statistics were submitted. No documents were submitted to substantiate investment. The 1967 and 1968 Tax Returns are inadequate in that regards.

7. No evaluation has been made as to the merits of individual RLB cases. Only RLB resolutions of findings, not complete records, were made available during the remand hearing.

> Although the Board attempted to ascertain the investment, proof thereof was not forthcoming. Consequently, the Board is unable to determine the applican't investment and award a fair and reasonable return thereon.

Med. West sought a return based upon other than cash contributions but was told:

> The owners total cash investment is equal to the cash capital contributions, $2,079,876., less drawings, $266,-407., for a total of $1,853,406. The unpaid builders fee and land increment are non-cash items and therefore disallowed. Loans by the Joint Venturers and from La Sala Contracting Co., Inc. are disallowed because they are accounts payable and not equity investment.

The ultra luxury Colony (Americana Associates) was a financial disaster from the outset. It was started in 1970 but did not obtain a certificate of occupancy until 1973. Less than three years later it was being operated by a court appointed receiver. When a hardship increase was requested, the RLB turned tragedy into triumph:

> This limited partnership during its existence from its inception in 1970 to December 31, 1975 *enjoyed* tax losses of $12,166,000, which was carried forward to the individual partners tax refunds. In our opinion, it would not be an unfair assumption that individuals making investments in this type of situation are of higher earning capacities, and usually are in the minimum of 50% tax brackets, for Federal income tax purposes. Therefore, we must assume that savings were available of over $6,083,000 in Federal income taxes during this period (50% of $12,166,000) against a net investment of $1,250,000 or a net economic gain of $4,833,000. (Emphasis supplied).

The Fort Lee limitation to a return based solely upon cash investment eliminates contributions by way of labor, material and undeveloped land. In addition, no adjustment is made for appreciation or inflation while withdrawals are always treated as depletion of capital. Rate of return is based entirely on the mortgage constant, a figure computed by dividing the face amount of the mortgage into yearly amortization and interest payments. It is a percentage that allows for retirement of debt and is usually slightly higher than the mortgage interest rate.

Procedurally, to determine whether a hardship increase is warranted, the RLB first ascertains the amount of cash investment. Next, it ferrets out and deducts from that figure any withdrawals of capital. This net figure is then multiplied by the mortgage constant plus 1% to yield what should be the just and reasonable return. Allowable operating costs, including debt service but not depreciation, are then added to the projected fair return. If the rental income is less than the total, a hardship increase is allowed to equalize the two figures. This chimerical RLB formula, unrelated to legislative guidelines, is the device purported to save Fort Lee landlord's from confiscation.

RETURN ON INVESTMENT

By conjuring up an example, results of this formula as it is applied by the RLB can be studied.

> Blackacre Park is a hypothetical development of two family homes located in a remote section of Fort Lee. The tract was developed right after World War II. In 1948, Roger Roe acquired one of the houses for $15,000 with a $3000 cash down payment and $12,000 GI mortgage for 20 years at 4½% interest. He rented the upstairs rooms and moved his family into the downstairs apartment. In 1970, faced with the cost of college education, he refinanced by obtaining a $25,000 conventional mortgage. Because of Roger's advanced age and current market rates, the new loan was for 10 years at 8% interest. In 1972, he retired, moved to Florida and rented the downstairs apartment. Since two family, non-owner occupied houses are subject to Fort Lee's rent control, Roger the owner became Roger the landlord. By 1977 the limitation on rental increases juxtaposed against increased heating, tax and maintenance costs showed him operating the building at a loss. Last year he borrowed money from his wife to meet monthly mortgage payments and stave off foreclosure. The Roe home is assessed for $45,000, a figure at which Blackacre Park houses are regularly sold.[8]

Let's see how Roger's hardship application fares before the Fort Lee RLB.

Just and reasonable return is based upon the original $3000 cash investment only. The fact that it has been tied up in the house for 30 years is not considered relevant. He is given neither credit for accrued interest[9] nor adjustment for inflation. No attempt is made to equate the value of 1948 dollars with the value of 1978 dollars. Money borrowed from his wife to meet debt service does not generate any return.

Despite the $15,000 original purchase price, only the cash down payment counts as investment. He is permitted no return on the $12,000 of amortization paid over the 20

8. The two family home example is not really far fetched since there are many small unit apartments in Fort Lee and the RLB has already ruled on one such hardship. Ironically, the landlords were a married couple and one of the two tenants in residence was Nippon Telephone Company.

9. Had Roger deposited $3000 in a bank account at 6% interest, it would have earned $180 each year. If the accrued interest were withdrawn, the $3000 principal sum would remain intact and the bank would pay interest on the full amount the following year. The RLB would allow a return on $2820, a position considered unfair by the Public Advocate.

year period that the GI mortgage was in effect. While the bank considers him a defaulting debtor who pledged his house as security for a loan, in the eyes of the RLB, Roger's refinancing is deemed withdrawal of capital. Therefore, since he has already realized a $22,000 profit on a $3000 investment, Roger is entitled to no return at all on his house and the hardship request must be denied.

If Roger had not refinanced and consequently been entitled to a return, the next step taken would be computation of a rate of return. His original GI mortgage had a constant of 7.6% and had it remained unsatisfied, he would have been permitted a return of 8.6% on $3000 or $258 annually. The present conventional loan has a constant of 14.5% so he is entitled to a return of 15.5% on $3000 or $465 annually. In any event, there is absolutely no rational basis for predicating rate of return completely upon mortgage terms. When applied in individual cases, the landlord with the best financing is limited to the lowest rate of return. Older buildings, fortunate enough to have long term, low interest mortgages, are penalized. This RLB yardstick is characterized as unfair even by Sheldon Blazar, the municipality's expert witness because the current market rate of return is disregarded.[10]

The 15.5% rate is really illusory because it relates to the $3000 down payment and not the $45,000 current market value. The fact that Bergen County real estate has tripled in value over the years is overlooked by the Board. To the owner of a $45,000 asset, $465 represents a 1%, not 15.5% return. If Roger had sold the house and deposited the proceeds in a bank account at 6% interest, he would realize a return of $2700. In addition, he would no longer be saddled with problems of boiler repairs, roof leaks, snow

10. If Roger's other taxable income were reduced because of expenses arising out of ownership of the house, Mr. Blazar would substract such tax benefits from the $465.

removal, redecorating, rent strikes and defending complaints before the RLB. Roger cannot be convinced that 1% over the mortgage constant on his investment gives him a just and reasonable return.

Certainly in some cases the amount of cash investment may be extremely relevant. For instance, the RLB found that Hampshire House, a 202 unit high rise, was started with a capital contribution of $400 yet during the course of construction the partners withdrew $730,000. An inference of overfinancing in these circumstances is clearly warranted and denial of hardship relief may be well justified. On the other hand, in the application of La Cross House, the Board became completely preoccupied with financial transaction which occurred many years prior to the imposition of rent control.

Nevertheless, the RLB maintains that it has the right to select investment rather than value as the basis for return and cites the *Trilogy* itself as authority. While it is true that Justice Pashman mentions "investment," "value" and "property," all three words are used synonymously. The Board raises a question of semantics where none exists since it is clear all are used to connote the proper basis upon which just and reasonable return should be computed for rent controlled properties. *Troy Hills, supra,* 68 N.J. Super. at 622-26. The RLB's use of the narrow dictionary definition of investment deviates from *Trilogy* standards. As the late Gertrude Stein would surely opine "an investment is a value is a property."

What Mr. Hannoch, the expert who so impressed the RLB, probably meant was that an equity investor in a real estate venture today would expect a higher return on his capital than a mortgage lender. Because of greater risk, 1% above the current mortgage rate is a reasonable return on this type of investment. His statement has been con-

verted into a simplistic formula for the determination of just and reasonable return by applying an obscure mortgage statistic to ancient financial history. Unfortunately, the answer is not that simple.

RETURN ON VALUE

The establishment of high rise apartment value before municipal rent leveling boards is a two step process entirely dependent upon the work product of experts. First come the accountants with their voluminous books and records to prove underlying financial transactions. Profit and loss statements, special operating statements and special operating projections hurl figures about like snowflakes in a blizzard.[11] Next, real estate experts are called to decipher the accountants' handiwork. The impression that real estate appraisers have left in the rent control field is reflected by the testimony of Jacob Ellman, an accountant and current Chairperson of the RLB:

> We've had some of the landlords call attorneys, they brought up appraisers, to us, trying to establish value, and all, and then you get conflicting within the same appraiser where they use—they use the same appraiser for tax appeals and then he comes up and does an appraisal which is completely contrary to what he gives just within the same month.
>
> The appraisal is completely different for what they want for rent leveling and what they have for the—and the Board has really disregarded all of the values as given because the testimony as we see it, as I see it, really doesn't substantiate any value. And we'd

11. Accounting procedures make facts hard to find
Figures are extrapolated, projected, refined
Depreciation doubled, depletion straight lined
They boggle the books and juggle the mind.

> be willing to listen to values. We're willing to listen if they'd give us something to listen to (T-1800-01).

When it was pointed out to Mr. Ellman that the inconsistency might be due to the use of different recognized appraisal methods, he responded:

> In that area the appraisers usually become long-winded and they go into a long—and I as an accountant quite knowledgeable with figures a lot of it goes over my head and I can't really comprehend what they're saying (T-1806).

Widely divergent opinions of real estate value depending on the employer of expert appraisers have greatly diminished the weight given to such evidence by the courts. *Twp. of Wayne v. Kosoff*, 73 N.J. 8, 14 (1977) (Condemnation Proceedings). The *Trilogy* forecast of difficulties that would be encountered in the application of standard appraisal methods has come to pass in these proceedings. An assessment of each appraisal method proffered by the real estate experts will demonstrate the limited extent of its individual utility for rent control purposes.

Depreciated Replacement Cost—This was tested in the 1974 *Helmsley* trial and failed miserably. If a landlord were to realize a fair return on value based upon this method, rents for the 11 complexes involved would have to be raised from a minimum of 34% up to 151%. Today, construction costs have risen to an estimated $40,000 per unit and severely inhibit new construction in Fort Lee. Generally conceded to be of no value, this method has been abandoned.

Capitalized Income—In a free market, this is the generally accepted method for appraisal of apartment buildings. The stream of income produced is capitalized to

determine value. Since rent control limits income, an essential element is removed making it virtually impossible to calculate capitalized value. Robert A. S. Miller, a local realtor who testified on behalf of plaintiffs, attempted to use this method. The problems encountered are illustrated by using Carriage House as an example. He began with an assumption that the 1977 fair net income was $1,018,947 which he capitalized ($1,018,947 ÷ .0975 = $11,200,000) to produce value. Next he applied a percentage of return to value (9.75% × $11,200,000 = $1,093,000) and obtained a fair return. The circuitous reasoning cautioned against by Justice Pashman could not be avoided, proving this to be an inappropriate method for rent control valuation. *Troy Hills, supra*, 68 N.J. at 625.

Assessed Value—Experts unanimously agree that tax assessments bear little relationship to market value. This is underscored in Fort Lee by numerous tax appeals which make determination of present assessed value an impossibility. However, since individual apartment buildings are seldom appraised, it furnished a yearly evaluation that can be applied to all properties. Moses Sternlieb used it as the basis for his projections and it has limited utility as a common denominator.

Hypothetical Market in Equilibrium—A market free from unusual economic forces does not require governmental control, so naturally:

> Rent control begins with the premise that rents are being unfairly inflated as a result of failure in the free operation of the rental housing market—*e.g.*, housing shortages, monopoly power, etc. A standard of valuation which itself incorporates this failure will quickly defeat the purpose of rental control. Thus, valuation based on inflated rents would inevitably and erroneously lead the courts to a conclusion that a regulation which fails to permit such inflated rents is confiscatory. ° ° ° Hence we employ the term "value" in the present context to refer to the value of the property in a rental housing market free of the aberrant forces which led to the imposition of controls. Where inflated rents are the result of a housing shortage, "value" refers to the worth of the property in the context of a hypothetical market in which the supply of available rental housing is just adequate to meet the needs of the various categories of persons actively desiring to rent apartments in the municipality. This technique of hypothesizing a rental market with comparable levels of supply and demand has been utilized in English rent control legislation for several years. *Troy Hills, supra*, 68 N.J. at 624-25.

In this case, two real estate experts, Mr. Bailey and Mr. Miller, were given a copy of the *Trilogy* and assigned the task of applying the English technique to the Fort Lee market place. The results were predictable. Even with the availability of extensive financial data compiled for this case, both realtors found it necessary to extract information from their own files in order to hypothecate a market in equilibrium. The additional factors involved resulted in greater than normal difference of opinion by the experts.[12] Any attempt to duplicate this undertaking for an individual hardship case would be prohibitively expensive and probably produce the same inconclusive results.

Sales of Comparable Properties—Absent vacancy decontrol, sales of rent controlled properties are rare events. This is proven by the fact that not a single Fort Lee apartment

12. Two real estate experts using one chart
Have opinions of value millions apart
Since both are correct it would seem to impart
That real estate appraisal is a miraculous art

building has been sold during the first five years of rent control. However, in our hypothetical two family home example, we had assumed comparable $45,000 sales of identical tract homes. Determination of just and reasonable return by this method should now become a matter of simple arithmetical computation. If we accept Mr. Miller's 9.75% current market rate of return and apply it to the $45,000 value, the just and reasonable return is $4387.50 exactly. Unfortunately, once again, the answer is not that simple.

FINDINGS AND CONCLUSIONS

By regulating future increments, municipal rent control supersedes an important aspect of the contractual relationship between landlord and tenant. The only vestige of "free market" that remains is the pre-rent control base upon which legal increases are calculated. But the setting of maximum rentals does not in any way displace the competitive market or fix rates for the industry.[13] Local police power may be employed to alleviate burdens on tenants attributable to demands for exorbitant rent increases through the adoption of a rent control plan. *Inganamort I, supra.* A resultant decrease in value of property so regulated does not require compensation if the overall plan benefits the designated class and is not confiscatory to owners. Valid rent control must permit efficient operators to earn a reasonable return without resort to hardship exception and limit use of this device to the atypical case. If virtually all landlords need relief from strict application or ordinance terms, the regulation as applied does not meet minimal constitutional standards. *Hutton Park, supra,* 68 N.J. at 570-71.

13. In the *Trilogy*, public utility law precedents were carefully distinguished, but even the mention of rate cases in the same breath as municipal rent control drew fire from Judge Conford in a separate concurrence. *Troy Hills, supra,* 68 *N.J.* at 635.

Just as an owner must accept the decreased value of his land in that he has no vested right to its most profitable use where limited by a municipal master plan, *N.J.S.A.* 40:55D-28; so, too an apartment owner must accept a limitation on rents collectible where the interests of the municipality so dictate.

One prerequisite for limitation of land use is a clearly defined master plan which incorporate a specific policy statement. *N.J.S.A.* 40:55D-28(d). Analagously, the preamble to Fort Lee *Ord. No.* 72-1 set forth the rent control policy of protection for the *citizens of the Borough* against demands for exorbitant rent increases. Without exception, similar language is found in every Bergen County rent control ordinance preamble. When this language is interpreted in tandem with the evidence before us, the legislative purpose becomes crystal clear. Bergen County municipal rent control today is not imposed for the benefit of tenants as a class but rather to protect the interest of tenants in residence. Its sole aim is to limit rental increases for present occupants and not to attract or provide housing for individuals living outside of the particular municipality. People seeking apartments have freedom of choice with regard to location, amenities and price range not available to tenants in residence. Consequently, when an apartment becomes vacant, the direct need for control vanishes.

Nevertheless, rent control over vacant apartments has been necessary for the protection of residential tenants against summary eviction by landlords. Residential tenants could have occupancy on a month to month basis or with relatively short term leases. By simply giving notice or refusing to renew, landlords could dispossess in a summary manner at the expiration of a term. Municipalites were concerned that if vacant apartments were left

without control, landlords would, at the earliest opportunity, dispossess tenants in residence to create vacancies and relet the premises at a higher rental.

This apprehension of the municipalities was vitiated in 1974 by enactment of the Tenants Bill of Rights. *N.J.S.A.* 2A:18-61.1. Since then, landlords can no longer refuse to renew leases or evict residential tenants except for good cause. Tenants in residence can only be removed if they violate lease obligations or a building is removed from the rental housing market. For all practical purposes, the New Jersey tenant has the option of a lifetime lease. *Meiser, Landlord-Tenant,* 1 (1976). Of course, rent control ordinances, like all municipal police power regulations must:

> ° ° ° not be unreasonable, arbitrary or capricious, the means selected must have a real and substantial relation to the object sought to be attained, and the regulation or proscription must be reasonably calculated to meet the evil and not exceed the public need or substantially affect uses which do not partake of the offensive character of those which cause the problem sought to be ameliorated. [*Kirsch Holding Co. v. Borough of Manasquan,* 59 N.J. 241, 251 (1971)].

The Tenants Bill of Rights has legislated control of vacant apartments into obsolescence. *Brunetti, supra,* 68 N.J. at 603.[14] According to the evidence, vacancy decontrol would have a stimulating effect upon a stagnant Fort Lee type real estate market. Vacancy decontrol is now obligatory in Fort Lee.

14. Vacancy decontol has already been adopted in Cliffside Park, Edgewater, Little Ferry and Ridgefield. Modified decontrol exists in Bergenfield, Hackensack, River Edge and Rutherford. To protect incumbent tenants, those municipalities require a statement to be filed with the local administration setting forth the reason for each vacancy.

To implement its legislative plan, Fort Lee, like all other Bergen County rent controlled communities, originally selected the device of limiting permissible rent increases in accordance with the fluctuation of the CPI.[15] It is a widely recognized measure of the dollar's purchasing power prepared by the U.S. Bureau of Labor Statistics. Because the CPI reflects the general inflationary spiral, its use as a limitation prevents landlords from extracting unconscionable profits.

In 1974, Fort Lee became but one of many Bergen County municipalities that deviated from the CPI and imposed a more stringent flat rate control.[16] This downward adjustment was based upon the notion that fixed apartment house operating costs were relatively unaffected by inflation and increases somewhat less than the CPI would adequately compensate landlords. While this might have been true in the past, Fort Lee's experience since 1974 proves that this is no longer a viable position.[17] Illustrative of Fort Lee's high rises, Med. I had an operating cost

15.

	1971	1972	1973	1974	1975	1976
CPI % INCREASE	5.8%	4.4%	6.3%	10.8%	7.6%	5.8%

16. See Appendix I

17. Had these costs not soared in the mid 1970's, undoubtedly some municipalities would now control rent by establishment of a fair net operating income ratio. Net operating income is the amount by which annual income exceeds operating expenses and regulation along these lines prevents profiteering. Easy to administer, it was fashioned by Congress after World War II (Housing and Rent Act of 1949, Par. 203(f), 63 Stat. 21), embodied in the last general N.J. Rent Control Statute of 1953 (*N.J.S.A.* 2A:42-14, *et seq.* (expired)) and still used in Boston and Cambridge. Rapidly rising costs of operation have caused New Jersey municipalities to discard this approach since all increases plus adjustments would be passed on to tenants. Stephen Lewinstein, the Boston Tax Attorney, experienced in rent control matters, described the almost insuperable difficulties encountered with this system in Massachusetts. To maintain landlords in the same position as the base year (1971 for Boston and 1967 for Cambridge) rent boards pass through increase costs and attempt to adjust for the decreased value of the dollar. Use of this system would result in larger increases than permitted by any Bergen County municipality.

increase of $345,658 compared to increased income of $161,194 during the period 1974-76. In addition, a U.S. Bureau of Labor Statistics study limited to items of the CPI affecting the apartment house industry, has been conducted. *U.S. Dept. of Labor, Bureau of Labor Statistics, 1975 Price Index of Operating Costs for Rent Stabilized Apartment House in New York City* (1975). According to the testimony of Marshall Sroge, President of the Rent Stabilization Association of New York City, this index was derived from the weighted percentage cost of approximately 90 out of the 400 CPI "market basket" items, ranging from fuel to floor wax, which directly affect the apartment house industry. Once established, it is monitored on a continuing basis and adjustments in the weighted percentages are made to reflect current market conditions. Based upon that information, accumulated during the year 1976, the increase affecting landlords was higher than the CPI (6.5%). *The City of New York, Rent Guidelines Board, Order Number 9*, June 30, 1977. Pursuant to *McKinney, Unconsol. Laws*, §8581, *et seq.*[18]

All of the evidence has proven that Fort Lee's deviation downward from the CPI was arbitrary and capricious because it had no factual basis. Although the municipality was in the best position to gather facts, not a single legislative finding was offered by Fort Lee during 17 days of trial and 2500 pages of testimony. Instead, the Borough remained mute and rested upon the presumption

18. The New York Rent Stabilization Law contains many highly desirable provisions that can easily be adopted by New Jersey municipalities. It rests upon a foundation derived from a specialized study. Currently, tenants are given the option of a one year lease with a 6.5% increase, two year lease with a 8.5% increase or a three year lease with a 11.5% increase. Tenants can have the benefit of a three year lease without further increase and landlords obtain the advantage of collecting a larger rent initially. With 770,000 apartments under rent stabilization, less than 180 hardship applications are pending. I recommend that the Supreme Court give its imprimatur in advance to any municipality which may elect to enact its provisions.

of validity. But this judge made device is afforded to governmental agencies on the premise that they have acted on a rational basis. *Hutton Park, supra*, 68 N.J. at 564-65. The CPI is an appropriate standard for rent control legislation and ordinances based upon it are properly cloaked with the presumption of validity. Governing bodies that utilize fractions of the CPI or flat percentages lower than the CPI should make legislative findings to substantiate their position. By removing the presumption of validity from such ordinances, municipalities could not arbitrarily select a percentage. In these limited situations, the burden of proof should shift from the property owner to the municipality. *Cf. Anderson v. Somberg*, 67 N.J. 291,305 (1975). Application of this principle is not only equitable but will avoid expense entailed by property owners and municipalities alike in this type of litigation.

In land use legislation, parameters of development must be clearly delineated and only in exceptional cases should resort to the administrative process be necessary. *N.J.S.A.* 40:55D-70. Certain exceptions may be enumerated in the municipal ordinance, *N.J.S.A.* 40:55D-65(f), while others might not have been contemplated but may be warranted for special reasons. See *e.g., DeSimone v .Greater Englewood Housing Corp. No. 1*, 56 N.J. 428 (1970), (governmentally-financed low and moderate income housing project); *Kunzler v. Hoffman*, 48 N.J. 277 (1966), (private hospital for emotionally disturbed); *Burton v. Montclair*, 40 N.J. 1 (1963), (private school); *Andrews v. Ocean Twp. Board of Adjustment*, 30 N.J. Super. 337 (App. Div. 1971), (seeing eye dog breeding facility). Analagously, a rent control plan must permit efficient operators to obtain a just and reasonable return without use of the administrative process except in unusual circumstances. In the area of rent control, costs engendered by fire damage or

modernization of dilapidated buildings, for example, might require tenants to pay more than maximum legal rent. In those exceptional cases the interest of the landlord and general public, as well as that of the tenant, should be carefully weighed. The evil of higher rents, per se repugnant to the legislative program, must be balanced against benefit of improved housing stock and potential harm of landlord abandonment. Solutions in these atypical situations must be adjudicated on an individual case basis, not by general application of some overly simplistic formula. *Troy Hills, supra,* 68 N.J. at 628-630.

The Fort Lee rent control mechanism seeks the irreducible minimum constitutional return for each individual building. Once this figure is ascretained by the RLB, it is monitored annually. Since determination of value is required to compute the lowest permissible rent for incumbent tenants, the problem of diminished value naturally resulting from stringent controls must be constantly confronted. But after raising the issue, the RLB refuses to deal with it and totally disregards value by using cash investment as the basis for just and reasonable return. At the same time the Rent Board employs cash investment, the Tax Assessor utilizes replacement cost for assessment purposes. Landlords, simultaneously taxed under one set of ground rules and rent controlled under another, counter with a flurry of tax appeals and law suits. Tenants, promised increases of only 2½%, pay larger sums into escrow accounts as hardship exceptions abound. Home owners, reminded of real estate tax benefits flowing from high rise construction, face the impact of reduced apartment house assessments already ordered by the Division of Tax Appeals. Since defense of the municipality's inconsistent position is financed by a continuous raid on the Borough treasury, the cost of duplicity is borne by all segments of the Fort Lee population.

The cumulative effect of the 2½% limitation, the tax surcharge repealer and the RLB hardship formula, applied to the fiscal facts adduced during the remand hearing, renders the entire Fort Lee rent control mechanism confiscatory and invalid. The CPI limitation remains in effect.

APPENDIX I

ACTUAL 1976 PERMITTED INCREASE	MUNICIPALITY	ORDINANCE PROVISIONS
6%	Lodi, Hasbrouck Heights	6% Flat Rate
5.8%	Wallington, Lyndhurst Bergenfield	Full CPI
5.8%	Little Ferry	Full CPI but no more than 10%
5.8%	North Arlington	Full CPI but no more than 6%
5.5%	East Rutherford	Half CPI but no less than 5.5% or more than 10%
5.4%	Fairview	Full CPI first 5%, half CPI between 5% and 10%, quarter CPI over 10%, but but not less than 5% or more than 10%
5%	Teaneck, Dumont Rutherford	5% Flat Rate
5%	Cliffside Park	5% but no more than $15 per month
4%	Ridgefield, Palisades Park, Elmwood Park	Full CPI but no more than 4%
4%	Leonia	Half CPI or 4% whichever is greater
4%	Edgewater, River Edge	4% Flate Rate
3%	Fair Lawn	3% Flat Rate; if invalid 6%
2.9%	Hackensack, Ridgefield Park, New Milford	Half CPI
2.9%	Englewood	Half CPI but no more than 5%
2.5%	Fort Lee	Full CPI but no more than 2½%

In addition to the maximum legal rent, all municipalities except Fort Lee, Edgewater, Teaneck and River Edge permit landlords to seek reimbursement for increased real estate taxes.

APPENDIX D

ORDER ON REHEARING (M-380)

This Court's opinion of October 17, 1978, struck down as invalid, at all times from the date of its adoption, §4 of Ordinance No. 76-8, which purported to repeal the real estate tax passthrough provision of Ordinance No. 74-32.

It is ORDERED that, except for the amplification of the Court's opinion as stated hereinabove, the petition for rehearing is denied.

WITNESS, The Honorable Richard J. Hughes, Chief Justice, at Trenton, this 14th day of November, 1978.

/s/

Clerk

APPENDIX E

ORDER ON REHEARING (M-381)

The validity of Ordinance 76-8, as applied, is not before this Court for review on the record presented.

It is ORDERED that the petition for rehearing and recall of judgment filed by plaintiffs-appellants is denied.

WITNESS, the Honorable Richard J. Hughes, Chief Justice, at Trenton, this 14th day of November, 1978.

/s/

Clerk

APPENDIX F

BOROUGH OF FORT LEE
BERGEN COUNTY
ORDINANCE NO. 74-32

(Effective November 6, 1974)

AN ORDINANCE TO REGULATE, CONTROL AND STABILIZE RENTS AND CREATE A RENT LEVELING BOARD WITHIN THE BOROUGH OF FORT LEE AND SUPERSEDING ORDINANCE NO. 72-1.

WHEREAS, the Governing Body of the Borough of Fort Lee does hereby declare that an emergency exists within the Borough of Fort Lee with respect to the rental of housing space in dwellings by reason of the demands for increase in rent which are determined by said government body to be exorbitant, speculative and unwarranted and that such increases are causing severe hardships upon tenants and are adversely effecting the health, safety and general welfare of the Citizens of the Borough of Fort Lee warranting legislative action by the Governing Body to protect and promulgate the health, safety and welfare of the Citizens of the Borough of Fort Lee warranting legislative action by the Governing Body.

WHEREAS, under the police powers granted to the Mayor and Council of the Borough of Fort Lee in order to protect and promulgate the health, safety and welfare of the Citizens of the Borough of Fort Lee, a Rent Leveling Board and Ordinance is determined to be necessary within the Borough of Fort Lee.

NOW, THEREFORE, BE IT ORDAINED, by the Mayor and Council of the Borough of Fort Lee, County of Bergen, and State of New Jersey, as follows:

SECTION 1. (a) "Capital Improvement" means capital which is expended by a landlord in the nature of an in-

vestment, for the improvement of a dwelling, made with the expectation of its useful existence for an indefinite period into the future, and which will inure in some significant degree to the benefit of the tenants thereof.

(b) "Dwelling" means and includes any building or structure or trailer or land used as a trailer park, rented or offered for rent to one or more tenants or family units. Exempt from this ordinance are motels, hotels and structures containing less than three units of housing space in which one such unit is owner occupied.

(c) "Housing Space" means and includes that portion of a dwelling, rented or offered for rent for living or dwelling purposes to one individual or family unit, together wi'h all privileges, services, furnishings, furniture, equipment, facilities and improvements connected with the use or occupancy of such portion of the property.

(d) "Index" means the Consumer Price Index (all items) for the region of the United States of which Fort Lee, New Jersey is a part, published periodically by the Bureau of Labor Statistics, United States Department of Labor.

(e) "Landlord" means the person who owns, purports to own or exercises control of any dwelling.

(f) "Periodic Tenant" means any month to month tenant or any tenant at will, or sufferance, or any tenant having a lease for a term of less than one year.

(g) "Rent" means the amount of consideration including any bonus, benefit, or gratuity demanded or received by virtue of any agreement between the parties whereby upon the payment of a sum certain by the one party (hereinafter "tenant"), the other (hereinafter "landlord") allows to him the peaceful and quiet enjoyment of the use and occupation of the unit of housing space for that time

period. If the parties agree that rent is to be paid upon some interval other than one month, then that shall be construed as an alternative method of payment and the monthly rent shall be calculated by apportioning the rent so as to determine the sum due for the term of one month. Where the parties have covenanted to provide for increments during the term of their agreement, such increment shall not be averaged up as an alternative method of payment calculation.

SECTION 2. Establishment of rents between a landlord and a tenant to whom this act is applicable shall hereafter be determined by the provisions of this ordinance. At the expiration of a lease or at the termination of the lease of a periodic tenant, no landlord may request or receive a percentage increase in rent for any housing space which is greater than the percentage difference between the Consumer Price Index three (3) months prior to the expiration or termination of the lease and the Consumer Price Index at the date the last previous lease term commenced. For a periodic tenant whose lease term shall be less than one year, said tenant shall not suffer or be caused to pay any rent increase in any calendar year which exceeds the average Consumer Price Index percentage differential for the calendar year prior thereto.

A vacancy in housing space shall not relieve the landlord from the controls of this ordinance as to such housing space.

Notwithstanding any of the foregoing provisions of this section to the contrary, no landlord may request or receive a percentage increase in rent with respect to any housing space which is greater than two and one-half (2½%) percent of the last prior rent during any calendar year.

SECTION 3. Any rental increase at a time other than at the expiration of a lease or termination of a periodic lease shall be void. Any rental increase in excess of that authorized by the provisions of this ordinance shall be void.

SECTION 4. No landlord may request or receive any rent increase with respect to any housing space in any dwelling as to which there exists at the time of said request or increase an outstanding notice of violation of any federal, state or local fire, health or housing law, code or ordinance.

SECTION 5. Any landlord seeking a rent increase shall notify the tenant by Certified Mail and the Rent Leveling Board of the calculations involved in computing the increase, including the Index three (3) months prior to the date such rent increase becomes due and owing; the Index as of the date the last previous lease term commenced; the allowable percentage increase and the allowable rent increase.

SECTION 6. A landlord may seek a tax surcharge from a tenant because of an increase in municipal property taxes. The tax surcharge shall not exceed that amount authorized by the following provisions. The landlord shall divide the increase in the present property tax over the property tax of the previous year by the number of square feet in the dwelling to obtain the tax increase per square foot. The tenant shall not be liable for a tax surcharge exceeding the tax increase per square foot multiplied by the number of square feet occupied by the tenant.

Any landlord seeking a tax surcharge shall file a schedule with the Rent Leveling Board, indicating the tax surcharge to all tenants and the method of calculation for

each, and shall notify the tenant by Certified Mail and the Rent Leveling Board of the calculations involved in computing the tax surcharge, including the present property tax for the dwelling.

SECTION 7. Where the tax surcharge a tenant is liable for shall exceed fifty ($50.00) dollars it may be paid in three (3) monthly payments commencing the first day of the month immediately following.

SECTION 8. The tax surcharge shall not be considered rent for purposes of computing any allowable rent increase under Section 2.

SECTION 9. In the event municipal taxes are reduced or in the event a tax appeal is taken by the landlord, and the landlord is successful in said appeal and the taxes reduced, the tenant shall receive fifty (50%) percent of said reduction as applied to its tax portion, after deducting all expenses incurred by the landlord in prosecuting said appeal.

SECTION 10. A landlord seeking a hardship increase shall make written application therefor to the Rent Leveling Board upon such forms as the Board may from time to time prescribe, and shall simultaneously thereafter deliver notice that such an application and forms have been filed with the Rent Leveling Board to each tenant. The information filed with the Rent Leveling Board shall be open to inspection by any affected tenant. Within thirty (30) days from the receipt of all required application forms, the Board shall notify the landlord in writing of the time and place of hearing thereon. The landlord shall immediately upon receipt of said notification of hearing mail a copy thereof by Certified Mail to each affected tenant. Prior to any hearing, the landlord shall present the Rent Leveling Board with proof of mailing of notice of hearing by Certified Mail to each affected tenant.

Upon a finding that a landlord cannot meet his mortgage payments, taxes, and current operating expenses on the dwelling, the Rent Leveling Board may grant the landlord a specific hardship increase for each unit of housing space in the affected dwelling, based upon the number of square feet of each unit of housing space. The Board shall notify the landlord in writing of its determination under this Section, and the landlord shall forthwith deliver a copy of said determination by Certified Mail to each affected tenant. The surcharge so allowed shall not be considered rent for purposes of computing any allowable hardship rental increase under Section 13, nor shall such surcharge be continued for a duration in excess of one year without first being reconsidered by the Rent Leveling Board after due and timely notice to tenants as heretofore provided.

SECTION 11. A landlord may apply for a capital improvement increase or for an increase for major additional services not theretofore provided to the tenants of units of housing space in the affected dwelling. The landlord shall make written application therefor to the Rent Leveling Board upon such forms as the Board may from time to time prescribe and shall simultaneously therewith deliver notice that such an application and forms have been filed to each tenant. The information filed with the Rent Leveling Board shall be open to public inspection by any affected tenant. Within thirty (30) days from receipt of all required application forms, the Board shall notify the landlord in writing of the time and place of a hearing thereon. The landlord shall immediately, upon receipt of said notification of hearing, mail a copy thereof by Certified Mail to each affected tenant. Prior to any hearing on said application, the landlord shall present the Rent Leveling Board with proof of mailing

of notice of hearing by Certified Mail to each affected tenant.

Upon a determination that the proposed improvement is a capital improvement, or that the proposed service is a major additional service not theretofore provided to the affected tenant or tenants, the Board may grant a rental surcharge based upon the cost of the capital improvement or major additional service, and which shall be justly apportioned among the affected units of housing space, based upon the number of square feet in each of the affected units. If any such increase is granted, it shall not be considered rent and shall not be included in calculating the rent increases allowable under Section 2 hereof. In no event shall any surcharge granted under this Section exceed fifteen (15%) percent of any tenant's rent. The Rent Leveling Board shall notify the landlord in writing of its determination under this Section and the landlord shall forthwith deliver a copy of said determination by Certified Mail to each affected tenant.

SECTION 12. Where a landlord because of unusual circumstances is agreeable to forego the maximum allowable rent, he may apply to the Rent Leveling Board setting forth the reasons therefor in order to protect the base rent, so that the higher rent is not waived as the base for a future tenant.

SECTION 13. Where a tenant requests a personalized service, furnishings, furniture, equipment, facility, alteration, or improvement to his housing space, which is unique and has negotiated a mutually satisfactory agreement with the landlord as to price and terms of payment therefor, such agreement shall not be deemed as part of rent and shall require prior approval of the Rent Leveling Board.

SECTION 14. The Rent Leveling Board as heretofore constituted is hereby dissolved, and a new Rent Leveling Board hereby created. Said Board shall consist of seven (7) members appointed by the Mayor with advice and consent of the Council, all of whom shall serve without compensation, and at least one of whom shall be a landlord or the managing agent of a landlord. Three members of the Board shall be appointed by the Mayor with the advice and consent of the Council for a term expiring December 31, 1974. Two members shall be appointed by the Mayor with the advice and consent of the Council for terms expiring on December 31, 1975. Two members shall be appointed by the Mayor with the advice and consent of the Council for terms expiring on December 31, 1976. Upon the expiration of the term of any member, the Mayor, with the advice and consent of the Council, shall appoint a citizen for a term of three (3) years. Vacancies occurring in the Board shall be filled by the Mayor with the advice and consent of the any member, the Mayor, with the advice and consent of Council for the unexpired term only. A member of the Board shall be be removable for cause by the Governing Body upon written charges and after public hearing thereon.

SECTION 15. The Rent Leveling Board is hereby granted, and shall have and exercise, in addition to others powers herein granted, all the powers necessary and appropriate to carry out and execute the purposes of this ordinance, including but not limited to, the following:

(a) To issue and promulgate such rules and regulations as it deems necessary to implement the purposes of this act, which rules and regulations shall have the force of law until revised, repealed or amended from time to time by the Board in the exercise of its discretion, providing that such rules are filed with the Borough Clerk.

(b) To supply information and assistance to landlords and tenants to help them comply with the provisions of this ordinance.

(c) To hold hearings and adjudicate applications from landlords for additional rental as hereinafter provided.

(d) To hold hearings and adjudicate applications from tenants for reduced rental as hereinafter provided.

(e) To enforce the provisions of this ordinance and to initiate proceedings in the Municipal Court for willful violations thereof.

(f) To insure subpoenas to compel the attendance of witness and the production of books and records in connection with hearings held pursuant to the provisions of this ordinance.

Said Board shall give both landlord and tenant reasonable opportunity to be heard before making any determination.

SECTION 16. Any determination of the Rent Leveling Board may be appealed by landlord or tenant to the Governing Body. Said appeal shall be made in writing within twenty (20) days from receipt of said determination, and shall set forth the specific bases for said appeal. The appellant shall deliver a copy of said notice of appeal by Certified Mail to each affected party. The Governing Body may thereafter notify all affected parties of the time and place of a hearing upon said appeal, which hearing shall be de novo unless a transcript or a stipulation of facts is supplied by the parties. In the event the Governing Body does not hold a hearing on said appeal within 30 days from receipt of application for the appeal, the determination of the Rent Leveling Board shall become final.

SECTION 17. During the term of this ordinance, the landlord shall maintain the same standards of service, maintenance, furniture, furnishings and equipment in the housing space and dwelling as he provided or was required to do by law or lease at the date the lease was entered into. Any willful violation hereof shall subject the landlord to punishment under Section 20, infra.

SECTION 18. No landlord shall after the effective date of this ordinance charge any rents in excess of what he was receiving from the effective date of this ordinance except for increases as authorized by this ordinance.

SECTION 19. The owner of housing space or dwelling being rented for the first time shall not be restricted in the initial rent he charges. Any subsequent rent increases, however, shall be subject to the provisions of this ordinance.

SECTION 20. A willful violation of any provisions of this ordinance including, but not limited to the willful filing with the Rent Leveling Board of any misstatement of fact, shall be punishable by a fine of not more than $200.00 and imprisonment for not more than thirty (30) days or both. A violation affecting more than one leasehold shall be considered a separate violation as to each leasehold.

SECTION 21. There is hereby established the following schedule of fees for Complaints and Applications to the Rent Leveling Board, which fees shall be payable to the Tax Collector of the Borough of Fort Lee:

Complaint Filing Fee ..... $ 2.00

Complaint Hearing Fee
(to be paid by the Unsuccessful party) ..... $ 5.00

Landlord application for increased rental due to hardship, or capital improvements, services or tax surcharge $15.00

SECTION 22. This ordinance, being necessary for the welfare of the Borough and its inhabitants, shall be liberally construed to effectuate the purposes thereof.

SECTION 23. If any of the provisions of this ordinance or the application of such provision to any person or circumstances is declared invalid, such invalidity shall not affect other provisions or applications of this ordinance which can be given effect and, to this end, the several sections, subsections, paragraphs, sentences and phrases of this ordinance are declared to be severable.

SECTION 24. Ordinance No. 72-1 and all amendments thereto are hereby superseded and repealed; provided, however, that all prior final determinations of the Rent Leveling Board as heretofore constituted, and all prior decisions of the Governing Board are hereby ratified and confirmed.

SECTION 25. This ordinance shall take effect immediately upon final passage and publication as required by law.

AMENDMENTS TO RENT LEVELING ORD.–
ORD. 74-32

SECTION 2: Delete the 16th word (periodic) of the 2nd sentence.

SECTION 5: Change wording for computation to agree with that spelled out in Section 2.

SECTION 14: . . . at least one of whom shall be a landlord or the managing agent of a landlord–

Add: one of whom shall be a tenant and one of whom shall be a homeowner . . .

APPENDIX G

BOROUGH OF FORT LEE
BERGEN COUNTY, N.J.
ORDINANCE NO. 75-45

(Effective July 31, 1975)

AN ORDINANCE AMENDING ORDINANCE NO. 74-32 WITH RESPECT TO THE CRITERIA AND PROCEDURES FOR THE OBTAINING OF TAX SURCHARGES AND HARDSHIP INCREASES IN THE BOROUGH OF FORT LEE.

BE IT ORDAINED by the Mayor and Council of the Borough of Fort Lee as follows:

SECTION 1. Section 6 of Ordinance 74-32 is hereby amended to read as follows:

"Section 6. A landlord may seek a tax surcharge from a tenant because of an increase in municipal property taxes. The tax surcharge shall not exceed that amount authorized by the following provisions. The landlord shall divide the increase in the present property tax for the dwelling over the 1974 property tax for the dwelling by the number of leasable square feet in the dwelling, excluding all common areas, passageways, and hallways, to obtain the tax increase per square foot. The tenant shall not be liable for a tax surcharge which exceeds the tax increase per square foot multiplied by the number of square feet occupied by the tenant.

"Any landlord seeking a tax surcharge shall file a schedule with the Rent Levelling Board indicating the tax surcharge to all tenants and the method of calculation for each, and shall notify the tenant by Certified Mail and the Rent Leveling Board of the calculations involved in

computing the tax surcharge, including the present property tax for the dwelling."

SECTION 2. Section 10 of Ordinance No. 74-32 is hereby amended to read as follows:

"Section 10. A landlord seeking a hardship increase shall make written application therefore to the Rent Leveling Board upon such forms as the Board may from time to time prescribe, and shall simultaneously thereafter deliver notice that such an application and forms have been filed with the Rent Leveling Board to each tenant. The information filed with the Rent Leveling Board shall be open to inspection by any affected tenant. Within thirty (30) days from receipt of all required application forms, the Board shall notify the landlord in writing of the time and place of hearing thereon. The landlord shall immediately upon receipt of said notification of hearing mail a copy thereof by Certified Mail to each affected tenant. Prior to any hearing, the landlord shall present the Rent Leveling Board with proof of mailing of notice of hearing by Certified Mail to each affected tenant.

"Upon a finding that a landlord cannot meet his mortgage payments, taxes, and current operating expenses on the dwelling, or cannot otherwise earn a fair and reasonable return upon his investment in the dwelling, the Rent Leveling Board may grant the landlord a specific hardship increase for each unit of housing space in the in the affected dwelling, based upon the number of square feet of each unit of housing space. The Board shall notify the landlord in writing of its determination under this Section, and the landlord shall forthwith deliver a copy of said determination by Certified Mail to each affffected tenant. The surcharge so allowed shall not be considered rent for purposes of computing any allowable hardship rental increase under Section 13, nor shall such surcharge

be continued for a duration in excess of one year without first being reconsidered by the Rent Leveling Board after due and timely notice to tenants as heretofore provided.

"In determining the inability of the landlord to earn a fair and reasonable return upon his investment in the dwelling such as to justify the hardship increase, the Rent Leveling Board shall consider the following factors:

(a) taxes;

(b) costs of maintenance and operation of the property;

(c) the kind, quality and quantity of the services being furnished or withheld by the landlord;

(d) the number and frequency of prior hardship or capital improvement increases for the dwelling;

(e) the landlord's original and current investment;

(f) the dates, amounts, terms and interest rates of all past and current mortgages on the dwelling;

(g) the amount of current professional and management fees and the relation, if any, between the landlord and the recipients of such fees;

(h) the age of the dwelling; as well as its original and current appraised value;

(i) the present and past rates of vacancy in the dwelling;

(j) the efficiency of current management;

(k) cash flow history, prior to the enactment of rent leveling, to present;

(l) other factors which the Board, through its experience, shall determine to affect the rate of return.

SECTION 3. This Ordinance shall take effect immediately upon final passage and publication as provided by law.

APPENDIX H

BOROUGH OF FORT LEE
BERGEN COUNTY
ORDINANCE NO. 76-8

(Enacted June 30, 1976)

AN ORDINANCE AMENDING ORDINANCE NO. 74-32 (RENT LEVELING ORDINANCE) OF THE BOROUGH OF FORT LEE.

BE IT ORDAINED by the Mayor and Council of the Borough of Fort Lee as follows:

SECTION 1. Section 1 of Ordinance No. 74-32 is hereby amended and supplemented by the addition of the following subsections (h) and (j):

"(h) Class 1 dwelling means any dwelling in which the landlord provides to the tenant all utilities (heat, electric, gas and water) for the tenant's dwelling unit at the landlord's sole expense."

"(j) Class 2 dwelling means any dwelling other than a Class 1 dwelling."

SECTION 2. Sections 2, 3 and 5 of Ordinance No. 74-32 are hereby superseded and repealed.

SECTION 3. Ordinance No. 74-32 is hereby amended and supplemented by the addition of the following Sections 2.1 through 2.14:

Section 2.1. Except as otherwise herein provided, no landlord shall request or receive in any calendar year any rent with respect to any housing space which is greater than: (a) the last base rent charged and allowable for said housing space in the last prior calendar year, + (b) the Maximum Allowable Percentage (MAP), as herein defined, of said last base rent.

SECTION 2.2. The MAP shall be calculated annually as hereinafter provided. The MAP for a Class I dwelling shall consist of the Operating Costs Adjustment (OCA) + Tax Adjustment (TA) + Utilities Adjustment (UA) + Prior Year Carryover (PYC), if any. The MAP for a Class 2 dwelling shall consist of OCA + TA + PYC, if any.

SECTION 2.3. The OCA for any calendar year shall be calculated by multiplying the percentage change in the "Housing" element of the index for the 12-month period ending in October of the last prior calendar year by .35.

SECTION 2.4. The TA for any calendar year for any dwelling shall be calculated in accordance with the following formula:

$$\frac{15\ (T2 - T1)}{T1},$$

where:

T2 equals all local property taxes finally assessed with respect to the dwelling for the last prior calendar year, (after giving effect to any judgment of the Bergen County Board of Taxation with respect to said year;) and actually paid to the tax collector on account of said final assessment not later than November 15 of said year.

T1 equals all local property taxes finally assessed with respect to the dwelling for the next-to-last prior calendar year (after giving effect to any judgment of the Bergen County Board of Taxation with respect to said year;)

For purposes of calculating, the TA, any contiguous complex of dwellings owned and operated by the same landlord shall be aggregated and treated as one dwelling.

SECTION 2.5. The UA for any calendar year shall be calculated by multiplying the percentage change in the

"gas and electricity" element of the index for the 12-month period ending in October of the last prior calendar year by .1.

SECTION 2.6. Notwithstanding the provisions of Section 2.2, if the MAP if any calendar year exceeds 6.5 percent for any Class 1 dwelling or 5 percent for any Class 2 dwelling, the MAP forsaid calendar year shall be limited to 6.5 percent or 5 percent respectively for such dwelling and the excess percentage shall constitute the PYC for said dwelling for the subsequent calendar year.

SECTION 2.7. Where the tenant or tenants principally obligated for the payment of rent under any lease are at least 62 years of age on January 1 of any calendar year, the MAP for said tenant or tenants shall be 20 percent less than the MAP otherwise allowable for said housing space for said calendar year.

SECTION 2.8. Any rental charge in excess of that authorized by the provisions of this Ordinance shall be void.

SECTION 2.9. A vacancy in housing space shall not relieve the landlord from the control of this Ordinance as to such housing space.

SECTION 2.10. Nothing herein shall be construed as preventing a landlord and a tenant from entering into a lease for a period in excess of one year. A multiple-year lease may provide for an increase in a subsequent calendar year; provided, however, that any subsequent rental increase shall not exceed the MAP for said subsequent calendar year for which an increase is provided.

SECTION 2.11. Within 15 days prior to the effective date hereof, the Rent Leveling Board shall promulgate the OCA, UA (if applicable), TA and MAP for all dwellings for the balance of the current calendar year. The Tax Collector, the Tax Assessor and the Borough Attorney shall assist the Board in the calculation of the TA.

SECTION 2.12. The MAP for any calendar year commencing after the effective date hereof shall be promulgated in the following manner. Not later than November 20, the Tax Collector shall certify to the Rent Leveling Board the amount of taxes assessed and actually collected with respect to each dwelling for the current year. Not later than November 20, the Tax Assessor shall certify to the Board the amount of any judgment of the Bergen County Board of Taxation reducing the assessment of any dwelling for the current year. Not later than November 30, the Rent Leveling Board shall promulgate the OCA, UA (if applicable), TA, PYC and MAP for each dwelling for the forthcoming calendar year.

SECTION 2.13. The provisions of Sections 2.11 and 2.12 are hereby declared to be solely for furthering the orderly administration of this Ordinance, and shall not be construed as affecting or conditioning any rights or duties of landlords or tenants hereunder.

SECTION 2.14. Any landlord seeking a rent increase shall notify the tenant by Certified Mail and the Rent Leveling Board of the calculations involved in computing the increase, including the base rent and the calculations involved in computing the OCA, UA (if applicable), TA, PYC, MAP, and the discount, if any, to tenants over the age of 62. In furtherance of this section, the Rent Leveling Board may, by rule or regulation, prescribe a form or forms to be employed by the landlord in complying with the provisions hereof.

SECTION 4. Sections 6, 7 and 8 of Ordinance No. 74-32 as heretofore amended are repealed.

SECTION 5. Section 9 of Ordinance No. 74-32 is hereby repealed.

SECTION 6. Section 19 of Ordinance No. 74-32 is hereby amended to read as follows:

"The owner of any housing space or dwelling which shall be completed after January 1, 1977 shall not be restricted in the initial rent and first subsequent rent increase charged with respect to such housing space or dwelling; provided, however, that the initial lease shall contain a rider executed by the tenant and stating in boldface, or italicized type of at least 14 points: "The Lessee hereby acknowledges that the first subsequent rent which may be charged upon expiration of this lease shall not be subject to the limitations imposed by any rent control ordinance within the Borough of Fort Lee.' "

SECTION 7. Subsections IV(A) through (D) of Ordinance No. 73-15 are hereby amended to read as follows:

"A. Where the owner owns between 2 and 25 dwelling units, the owner shall deposit $50.00 for each dwelling unit.

B. Where the owner owns between 26 and 40 dwelling units, the owner shall deposit $1,250.00 for the first 25 units and $25.00 for each additional unit owned.

C. Where the owner owns more than 40 dwelling units, the owner shall deposit $1,250.00 for the first 25 units, $25.00 per unit for the next 15 units and $15.00 per unit for each additional dwelling unit.

D. In no event shall an owner of one or more multiple dwellings be required to deposit more than $12,500.00 in security funds pursuant to this Ordinance."

The Tax Collector shall effect the refunds resulting from the foregoing amendment within thirty (30) days after the effective date hereof.

SECTION 8. If any of the provisions of this Ordinance or the application of such provision to any person or circumstances is declared invalid, such invalidity shall not affect other provisions or applications of this Ordinance which can be given effect and, to this end, the several sections, subsections, paragraphs, sentences and phrases of this Ordinance are declared to be severable.

SECTION 9. Section 4 of this Ordinance shall take effect immediately upon final passage and publication as provided by law. All other sections of this Ordinance [shall take effect thirty (30) days following final and complete disposition of the appeal of the plaintiffs-appellants in the case of Harry B. Helmsley, et als., v. The Borough of Fort Lee, et als., Superior Court of New Jersey Docket No. L-11348-74]. Upon said final and complete disposition of said appeal, the Borough Attorney shall forthwith in writing so advise the Rent Leveling Board and the Borough Clerk. Within five (5) days thereafter, the Borough Clerk shall cause to be published in an official newspaper a notice as to the date of disposition of the appeal and the effective date of said other sections of this Ordinance.

APPENDIX I

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that all the plaintiff-appellants in this consolidated case, HARRY B. HELMSLEY, et als., AMERICANA ASSOCIATES, et als., and NEW JERSEY REALTY COMPANY, et als., the plaintiff-appellants above named, hereby appeal to the Supreme Court of the United States from the final judgments of the Supreme Court of the State of New Jersey modifying the judgment in the Law Division in *Helmsley v. Fort Lee*, and reversing the judgment of the Law Division in *New Jersey Realty Co. v. Fort Lee*, and *Americana Associates v. Fort Lee* entered in this action on October 17, 1978. Petition for Rehearing was denied on November 14, 1978.

This appeal is taken pursuant to 28 U.S.C. 1257(2).

ARONSOHN, KAHN & SPRINGSTEAD
Attorneys for all Plaintiffs-Appellants

By: /s/ Richard F. Aronsohn
RICHARD F. ARONSOHN

RAVIN & KESSELHAUT
Attorneys for all Plaintiffs-Appellants

By: /s/ Martin Kesselhaut
MARTIN KESSELHAUT

DATED: February 1, 1979.

Received: February 2, 1979

STEVE W. TOWNSEND
Clerk, N.J. Supreme Court

PROOF OF SERVICE

I, MARTIN KESSELHAUT, one of the attorneys for all the Appellants, HARRY B. HELMSLEY, et al., herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the first day of February, 1979 I served a copy of the foregoing Notice of Appeal to the Supreme Court of the United States upon the Clerk of the New Jersey Supreme Court, Trenton, New Jersey, by first class regular mail, and upon the following parties by first class regular mail:

1. On the Appellee, the Borough of Fort Lee to its counsel of record, McCarter & English, Esqs., 550 Broad Street, Newark, New Jersey, 07102.

2. On the Intervenor below, Stanley C. Van Ness, Esq., Public Advocate, 520 East State Street, Trenton, New Jersey, 08625, Attention: Kenneth E. Meiser, Esq.

3. On the Amicus Curiae below, John Atlas, Esq., Essex-Newark Legal Services, 380 Main Street, East Orange, New Jersey, 07017.

RAVIN & KESSELHAUT,
Attorneys for all Appellants
80 Main Street
West Orange, New Jersey 07052

/s/ Martin Kesselhaut
MARTIN KESSELHAUT

In The

Supreme Court of the United States

October Term, 1978

No. 78-1255

HARRY B. HELMSLEY, et al.,

Appellants,

vs.

THE BOROUGH OF FORT LEE, et al.,

Appellees.

AMERICANA ASSOCIATES, et al.,

Appellants,

vs.

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NEW JERSEY REALTY COMPANY, et al.,

Appellants,

vs.

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Appellees.

On Appeal From the Supreme Court of New Jersey

MOTION TO DISMISS

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Appellees,

NEW JERSEY REALTY COMPANY, et al.,
Appellants,

vs.

THE BOROUGH OF FORT LEE, et al.,
Appellees.

On Appeal From the Supreme Court of New Jersey

MOTION TO DISMISS

The appellees, Borough of Fort Lee, et al., hereby move to dismiss the appeal herein on the ground that it does not present a substantial federal question. In the event this appeal is regarded as a petition for writ of certiorari, as alternatively requested by appellants (JS4),* certiorari should be denied for essentially the same reasons that the appeal should be dismissed.

QUESTION PRESENTED

Does appeal from a state supreme court's judgment, wherein firmly established constitutional principles respecting economic regulation were applied to the facts of a particular case which facts were rigorously reviewed, present a substantial federal question?

STATEMENT

This appeal involves a continuation of the attack by Fort Lee landlords upon the validity of the Borough's rent leveling ordinance, Ordinance No. 74-32 as amended (JS86a-105a). Rent leveling has existed in Fort Lee since early 1972; the present ordinance (No. 74-32) was adopted in November of 1974.

The history of this litigation, described in the opinion of the Supreme Court of New Jersey (JS3a-7a), began in 1974 and has had a long and complicated history. The record is enormous. Indeed, the 1977 hearing on remand alone consumed seventeen trial days (JS5a). The state supreme court, as evident from its lengthy opinion, carefully reviewed the facts, most of which were in the form of documentary or financial data, prior to issuing its judgment from which this appeal is taken. In essence, the landlords' appeal requests that this Court undertake a complete re-examination of the record.

In considering the issues now raised in the pending appeal, the Supreme Court of New Jersey used a two-step analysis. First, the court examined whether there was any rational basis

for the enactment of a rent leveling ordinance by the Borough, and concluded that there was (JS8a-9a). The extremely low vacancy rates established a serious housing shortage, a rational basis for rent leveling, even when measured by the standards of the landlords' own experts.

Second, the court, having concluded that rent leveling was justified, then considered in detail whether the landlords were deprived of a "just and reasonable" return by application of the ordinance (JS9a-35a). In relating returns to values of the rental housing properties, the court found that rates of returns achieved in 1976 (the last year of actual financial data presented by the landlords) were in the aggregate approximately ten percent of value, which rate satisfied the landlords' own criteria for desired return (JS12a). When analyzed on a net operating income approach, the court found, *inter alia,* that the automatic increase provision of the ordinance had not caused a decrease in landlords' profits from 1973 to 1976 (JS18a). Indeed, it acknowledged that use of "1973 as the standard may be unduly generous to the landlords," since 1973 was a relatively good year for them (JS18a, fn. 11). The ordinance was, therefore, held to be nonconfiscatory up to December 31, 1976.

The focus of the court as to the post-1976 period was dramatically different. The test used was no longer the reasonableness of the ordinance based upon proven or actual financial data. The test became one of "foreseeability" for the long-range future, rather than for a particular year (JS22a). Foreseeability was likewise a "generous" standard for the landlords. Likewise the court's view of the inadequacy of the hardship mechanism of the ordinance was extremely liberal to the landlords. (A hardship surcharge was allowed in addition to automatic rent increases; the median percentage hardship surcharge granted was 13.65% of revenue (JS28a), indicating that relief in individual cases was available and granted.) In any event, the court invalidated the 2½% automatic increase provision of Ordinance No. 74-32 for the years subsequent to 1976, and directed that the Consumer Price Index standard, an alternative set forth in the ordinance, be followed.

The validity, as applied, of the "Maximum Annual Percentage" formula in Ordinance No. 76-8 (JS100a-105a) was not presented to the Supreme Court of New Jersey (JS38a-39a, 85a).

The opinion of the Supreme Court of New Jersey is reported as *Helmsley v. Borough of Fort Lee*, 78 N.J. 200, 394 A.2d 65 (1978).

ARGUMENT

This appeal presents no substantial federal question warranting review by this Court.

1. The landlords, in arguing that rent control legislation must be founded upon a national or local emergency, are advocating a substantive due process philosophy which has been deliberately, consistently and long ago discarded by the Supreme Court. Indeed, that their arguments are based upon outmoded theories of due process is demonstrated by their heavy reliance upon economic regulation cases of the 1920's.

Since 1934, When *Nebbia v. New York*, 291 U.S. 502, was decided, the validity of price control legislation has not depended upon the existence of an emergency. The discarding of the "emergency" theory of due process was recognized in *Olsen v. Nebraska*, 313 U.S. 236, 246 (1941), where the Court specifically rejected the contention "that special circumstances must be shown to support the validity of such drastic legislation as price-fixing."

The landlords must also fail in their attempt to extend cases, such as *Bowles v. Willingham*, 321 U.S. 503 (1944), to stand for the proposition that rent control legislation must be supported by an emergency. The existence of a war-time emergency may have been necessary to the holding in *Bowles* that there is "no constitutional necessity of providing a system of price control on the domestic front which will assure each

landlord a 'fair return' on his property." 321 U.S. at 519. It certainly does not mean that an emergency is constitutionally required to support any form of rent control under the exercise of the police power, particularly a form, such as at issue here, which has been analyzed under the criterion of "fair return".

Moreover, a rational supporting basis for the ordinance, *i.e.*, a serious housing shortage, was found to exist. Of course, the wisdom of the ordinance is not a matter of judicial concern, as stated in *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483, 488 (1955):

> "The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought. [Citations omitted include *Nebbia* and *Olsen*.]"

2. In its opinion, the Supreme Court of New Jersey began with the assumption that "a rent control ordinance must permit an efficient landlord to realize a 'just and reasonable' return." (JS2a). That assumption, which pervades the entire opinion, is the mandated constitutional standard. The landlords do not contend otherwise. The state supreme court, as it recognized (JS2a-3a), did not alter the standard, but rather considered its application to the facts of this particular case.

The review of the facts by the Supreme Court of New Jersey was by no means perfunctory. The lengthy opinion is almost entirely restricted to discussion of the facts. The court's findings, which have ample support in the record, should not be disturbed. It is submitted that plenary consideration by this Court is not warranted to review a factual record already carefully scrutinized by a state supreme court, which applied an established constitutional principle to the relevant facts.

3. The opinion of the Supreme Court of New Jersey does not refer to the federal constitution, nor does it cite any United States Supreme Court, or other federal court, cases, except tangentially (JS10a). The constitutional principles previously established by the New Jersey Supreme Court in *Hutton Park Gardens v. West Orange Town Council,* 68 N.J. 543, 350 A.2d 1 (1975); *Brunetti v. Borough of New Milford,* 68 N.J. 576, 350 A.2d 19 (1975); and *Troy Hills Village v. Parsippany-Troy Hills Tp. Council,* 68 N.J. 604, 350 A.2d 34 (1975) were never seriously questioned or challenged by any party.

CONCLUSION

For the foregoing reasons, the questions presented by appellants are clearly insubstantial and, accordingly, the appeal should be dismissed.

Respectfully submitted,

s/ Richard C. Cooper
s/ William T. Reilly
McCARTER & ENGLISH
Attorneys for Appellees

78-1255

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-1225

HARRY B. HELMSLEY, et al.,
Appellants

v.

THE BOROUGH OF FORT LEE, et al.,
Appellee

AMERICANA ASSOCIATES, et al.,
Appellants

v.

THE BOROUGH OF FORT LEE,
Appellee

NEW JERSEY REALTY COMPANY, et al.,
Appellants

v.

THE BOROUGH OF FORT LEE, et al.,
Appellee

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

MOTION TO DISMISS

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OTHER REFERENCES

INTRODUCTION

Appellee, New Jersey Department of the Public Advocate moves the court to dismiss the appeal herein on the ground that there is no substantial Federal question.

THE NATURE OF THE CASE

In August 1977 the New Jersey Supreme Court vacated and remanded these cases for a hearing on the issues of fair and reasonable return. The New Jersey Department of the Public Advocate was permitted to intervene at that point to represent the interests of tenants. A seventeen day hearing was held on the subject. Based on this voluminous record the New Jersey Supreme Court rendered a comprehensive 44 page decision. *Helmsley v. Borough of Fort Lee*, 78 *N.J.* 200, 394 *A.*2d 65 (1978).

Plaintiffs challenged the constitutionality of the Fort Lee rent control ordinance. The ordinance was amended to allow landlords an automatic 2.5% rent increase each year. Landlords could also automatically pass on to the tenant any increase in their property tax. Finally if the landlord needed additional rental increases, he could seek a hardship increase from the Fort Lee Rent Board. Plaintiffs argued that the provision of the ordinance restricting automatic rent increases to 2.5% per year was unconstitutional.

The New Jersey Supreme Court declared that the Constitution does not require rent control laws to permit all cost increases to be automatically passed through to tenants. In fact, a municipality could validly dispense with all automatic increases and require a landlord to apply to the Rent Board for all increases. 35a. This is the way that most public utility commissions handle rate increases for public utilities. However the court held that if a municipality seeks to impose stringent limitations on automatic increases, it must provide a prompt, fair and efficacious system of administration relief. *Helmsley*, 44a. If a municipality does not have a prompt fair and efficacious system of administrative relief, then it must enact a "more moderate rent control scheme," one which permits automatic

rent inceases sufficient to allow landlords a fair return. The court found that Fort Lee's rent board had not yet developed a prompt, fair and efficacious system of administrative relief.* Accordingly Fort Lee was required to provide automatic rent increases of sufficient magnitude so that they would not have a confiscatory effect on landlords.

Having established this legal standard, the court then reviewed the facts to determine whether, as plaintiffs alleged, the 2.5% limitation on automatic increases would have a confiscatory effect on Fort Lee landlords. The New Jersey court held that the landlords had failed to meet their burden of proof that the 2.5% limitation was confiscatory to landlords from 1974 to 1976. 18a-19a. Nevertheless the plaintiffs did prove that the foreseeable impact of the 2.5% limitation after 1976 would be widespread confiscation. *Helmsley*, 19a. Accordingly the New Jersey Supreme Court declared the amendment to the ordinance limiting rent increases to 2.5% invalid as of December 31, 1976; the effect of its decision was to reinstate the original provision of the ordinance allowing landlords to raise rents by the percentage increase in the Consumer Price Index. *Helmsley*, 35a.

Plaintiffs fundamental grievance with the New Jersey Supreme Court decision is that the court failed to invalidate the 2.5% limitation for the period 1974-76. This decision is not the result of an interpretation of constitutional law. The decision of the court is based purely and simply upon the failure of plaintiffs to meet their burden of proof. No substantial Federal question is presented.

Plaintiffs also raise a second legal question. The New Jersey Supreme Court determined that a rational basis for the imposition of rent control in Fort Lee existed. Plaintiffs now argue that, as a matter of substantive due process, nothing less than a national emergency will justify rent control. As will be

*Contrary to plaintiffs' assertions in its brief, the court in its decision did not declare the administrative system unconstitutional. The Board remains in operation and any aggrieved landlord may appeal a decision it renders to the New Jersey Superior Court, Appellate Division.

shown, this argument is without merit and does not raise a substantial Federal question.

I. THE FAILURE OF THE APPELLANTS TO MEET THEIR BURDEN OF PROOF ON THEIR ALLEGATION OF CONFISCATION FOR THE PERIOD 1974-76 DOES NOT RAISE A SUBSTANTIAL FEDERAL ISSUE.

Fort Lee New Jersey allowed landlords a 2.5% automatic rent increase each year and also allowed each landlord to automatically pass-through increases in property taxes. If a landlord needed additional increases in order to make a fair return, he could seek a hardship increase from the Fort Lee Rent Board.

Plaintiffs filed suit challenging this ordinance on constitutonal grounds. The New Jersey Supreme Court held that the plaintiffs had proven that 2.5% limitation after December 31, 1976 would have a "foreseeable confiscatory effect." *Helmsley*, 19a, 22a. However the landlords had failed to prove that the 2.5% limitation had a confiscatory effect for the period of November 6, 1974 to December 31, 1976. *Helmsley*, 19a. The issue which appellants seek this court to review is whether the New Jersey Supreme Court erred in finding that appellants failed to meet their burden of proof. This burden of proof question raises no substantial Federal constitutional issue.

The appellants chose not to produce any evidence about their investment in their buildings or about their return on investment for the period in question (1974-1976). *Helmsley*, 15a. Thus the Supreme Court had no evidence by which it could determine that the appellants were not making a fair return on investment.*

*The plaintiffs' asserted that they were not making a fair return on the fair market value of their buildings. The Supreme Court found this approach to be circular and unworkable. It is circular because the value is determined through capitalization of income; yet the amount of income to be allowed is the very question at issue. The circularity of a value formula in the context of public utility regulation was recognized in *Federal Power Commissioners v. Hope Natural Gas*, 320 *U.S.* 591, 64 *S. Ct.* 281, 88 *L. Ed.* 333 (1974). Because of the circularity problem, no public utility commission considers fair market value in determining rates for utilities. Bonbright *Principles of Public Utility Rates*, (1961) p. 163-4.

The appellants did however produce general financial data on their operating expenses and income. Based on a careful examination of this data, the New Jersey Supreme Court held that the appellants had not met their burden of proof in proving confiscation for this two year period. The New Jersey Supreme Court gave three reasons to support its decision. First the landlords net operating income (income minus operating expenses) in most buildings for 1976 was within 5% of the 1973 level. Furthermore, a simple comparison of figures "is vulnerable to distortion caused by abnormalities in either the 1976 or 1973 data" and the landlords "have not submitted any more sophisticated statistical analysis." *Helmsley*, 18a. The court concluded "On the present record, however, we cannot say that the 2.5% limitation was confiscatory because landlords' profits remained approximately constant between 1973 and 1976." *Helmsley*, 17a-18a. Likewise although the landlords' operating ratios (ratio of operating expenses to income) were rising, the court could not "say on this record that the general level is clearly confiscatory. Here again, plaintiffs presented only sketchy and conclusory testimony." *Helmsley*, 18a. Finally the court stated that the appellants had not proven that the few buildings with low net operating income and high operating ratios which might have qualified for hardship relief were not isolated cases. The court held that a limited number of hardship cases alone does not prove widespread confiscation. *Helmsley*, 18a-19a. The decision of the New Jersey Supreme Court that the Fort Lee Ordinance in its application from 1974 to 1976 was constitutional is not based upon any far-reaching constitutional determination. Its simple holding is that appellants failed to meet their burden of proof. No substantial Federal question is involved.

II. PLAINTIFFS' FAILURE TO PROVE THE ABSENCE OF A RATIONAL BASIS FOR RENT CONTROL DOES NOT RAISE A SUBSTANTIAL FEDERAL QUESTION

Plaintiffs argued that there was no rational basis for rent control in Fort Lee. After carefully considering the evidence, the New Jersey Supreme Court rejected their argument. Indeed the New Jersey Supreme Court found that plaintiffs' own

proofs established a rational basis for rent control. The court stated:

> Contrary to plaintiffs' contentions, their own proofs demonstrate an adequate factual basis for adoption of rent control in Fort Lee. In *Troy Hills Village, supra,* the municipality's expert testified that a vacancy rate of less than 3% indicated a serious housing shortage. Other testimony then showed that the local vacancy rate was less than 2%. We found that, on this basis, the governing body could rationally conclude that rent control was necessary. Similarly, in the present case, several of plaintiffs' experts stated that a 5% vacancy rate was typical of a housing market in equilibrium; one fixed a 3% vacancy rate as indicative of a housing shortage. Plaintiffs' financial data indicate a 1973 vacancy rate of less than 1.5% in 28 buildings with 4648 units. One 1260-unit complex, Horizon House, had a 7% vacancy rate which appears to be abberational. Even including Horizon House, the borough-wide vacancy rate was 2.6%. As in *Troy Hills Village, supra,* these data constitute a rational basis for adoption of rent control. We note parenthetically that vacancy rates dropped under Ord. No. 74-32. The 1976 vacancy rate in 35 buildings with 7542 units was 1.9%. Thus it is apparent that there continues to be a rational basis for rent control in Fort Lee. *Helmsley,* 8a-9a.

Plaintiffs further argue that a "serious housing shortage" Helmsley, 8a, is not sufficient grounds for imposing rent control. Based on two cases which are fifty years old, *Block v. Hirsch,* 256 *U.S.* 135 (1921) and *Chastleton Corp. v. Sinclair,* 264 *U.S.* 543 (1924), plaintiffs assert that nothing short of a national emergency will justify rent control. Plaintiffs' argument however is forty years out of date. As one commentator concluded "The concept that an emergency is a constitutional prerequisite to price controls is a relic from the 1920 era of economic substantive due process." Barr and Keating. *The Last Stand of Economic Due Process-The Housing Emergency Requirement for Rent Control,* 7 Urban Lawyer 447 (1975).

In the 1920s and the early 1930s the Supreme Court repeatedly held that legislation regulating the amount to be charged for goods and services was unconstitutional as a violation of due process unless there was an emergency necessitating the legislation. The reign of Economic Due Process however came to an end with a series of cases in the 30s. One of these cases *Nebbia v. New York,* 291 *U.S.* 502 (1933) specifically repudiated the emergency requirement for price controls. *Nebbia* contains an exhaustive discussion of the right of government under the police power to regulate business, including the price which businesses charge.

The key sentence of *Nebbia* states:

> Price control, like any other form of regulation is unconstitutional only if arbitrary, discriminatory or demonstrably irrelevant to the policy the legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty. 291 *U.S.* at 539.

A number of courts have recognized that *Nebbia* was the death knell for the emergency doctrine which plantiffs assert. For example in *Eisen v. Eastman,* 421 *F*2d 560, 567 (2nd Cir. 1960) Judge Friendly declared:

> (W)e have no doubt that it (the Supreme Court) would sustain the validity of rent control today . . . The time when extraordinarily exigent circumstances were required to justify price control outside the traditional public utility areas passed on the day that *Nebbia v. New York,* 291 *U.S.* 502, 539, 54 *S. Ct.* 505, 78 *L. Ed.* 940, 89 *A.L.R.* 1469 (1934) was decided.

Likewise both the New Jersey Supreme Court in *Hutton Park Gardens v. West Orange Town Council,* 68 *N.J.* 543, 350 *A.*2d 1 (N.J. 1975) and the Maryland Court of Appeals in *Westchester West No. 2 v. Montgomery County Md.,* 276 *Md.* 448, 348 *A.*2d 856 (Md. Ct. of Ap. 1975) have rejected the emergency argument. Both courts trace the evolution of the United States Supreme Court decisions in the first part of the twentieth century. Both conclude that the *Nebbia* decision

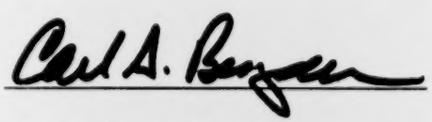
and the repudiation of economic substantive due process eliminate any requirement that price controls must be based upon an emergency. Both follow *Nebbia* and state that the constitutional test for rent control is whether the governing body had a rational basis for imposing it. Since the Supreme Court in *Helmsley* found such a basis, there is no substantial Federal question in this case.

CONCLUSION

It is respectfully submitted therefore that no substantial question is presented in this matter and the appeal should therefore be dismissed.

STANLEY C. VAN NESS, PUBLIC ADVOCATE

DATED: 3/7/79

BY: 

CARL S. BISGAIER
Attorney for Intervenor-Appellee

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1255

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Appellee.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF REALTORS® IN SUPPORT OF JURISDICTIONAL STATEMENT OF APPELLANTS.

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IN THE

Supreme Court of the United States

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ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.

The National Association of Realtors® respectfully moves

this Court for leave to file its brief *amicus curiae* in support of Appellants' jurisdictional statement. In support of its motion, the National Association asserts its firm belief that the decision of the Supreme Court of New Jersey preserving the validity of a Fort Lee Rent Control Ordinance (Ordinance No. 76-8) previously challenged as being violative of the Due Process Clause of the Fourteenth Amendment of the United States Constitution presents substantial federal questions and issues appropriately suited for resolution only by this Court.

The National Association of Realtors® respectfully requests that it be permitted to file the annexed brief *amicus curiae*.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1255.

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ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY.

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF REALTORS® IN SUPPORT OF JURISDICTIONAL STATEMENT OF APPELLANTS.

IDENTITY OF AMICUS.

The National Association of Realtors® (hereinafter NAR) is a non-profit professional association comprised of persons engaged in all phases of the real estate business. Its membership includes fifty State Associations of Realtors®, over 1,700 Member Boards of Realtors® and nearly 750,000 individuals.

NAR was created in 1908 to serve the public and this nation by promoting professional competence in the rendition of real estate services and by protecting the rights of owners and users of the land. Its efforts for nearly three quarters of a century both in the public and private sectors have contributed materially to making Americans the best housed people in the world.

INTEREST OF AMICUS.

The interest of NAR in this cause derives from its continuing concern for and commitment to the housing needs of the nation. The hundreds of thousands of NAR members and the millions of Americans they serve have followed the painful and protracted progress of this cause through the courts.

Now that this case has reached this honorable Court, NAR respectfully urges that the substantial Constitutional issues and federal questions it presents be recognized and authoritatively resolved.

The issue presented by this cause is not merely the legality of an ordinance in a small town in New Jersey. The issue is the measure of protection afforded to property owners by the Due Process Clause of the Fourteenth Amendment of the United States Constitution against the effective confiscation of the economic value of land ownership through the exercise of the police power of states and communities. The issue is whether the Constitution permits a state or municipality to take away the primary rights and benefits of land ownership without compensation and convert the title to land into nothing more than an empty "fee".

This is not an issue which can be deferred to a more convenient season. Analogous rent control ordinances presently exist in over 200 municipalities. Various states which presently have no rent control have prepared to impose it through the enactment of enabling legislation while numerous other state legislatures have rent control legislation under consideration. Many, if not most of these ordinances and statutes, like the ordinance at issue in this cause, involve the effective confiscation of investment in land.

The existence of these rent control ordinances and statutes, coupled with the absence of any definition by this Court of the permissible limits of their application and effect under the Constitution, has already done serious damage to the housing resources of the nation. Continued silence by this Court, we respectfully submit, assures irreparable harm.

The uncertain and ill-defined Constitutional safeguards against the confiscation of land values through rent control not only impair the exercise of legitimate property rights, but also, and perhaps more importantly, detrimentally effect the "general welfare" of the people.

As representatives and agents of property owners and investors, over 750,000 members are uniquely aware of the need to resolve for the nation as a whole the fundamental Constitutional issues presented here.

They know that confiscatory rent control diminishes and ultimately forecloses investment in rental properties, discourages expenditures in existing rental properties and forces the conversion of rental units to condominiums.

They know that the failure to produce new rental properties and to maintain existing rental properties exacerbates the shortage of rental housing.

They know that the shortage of rental housing impacts most directly on the elderly, minorities and new families, all of whom are most in need of better housing.

They know that when private investment in rental housing is made to fail, public housing is the only available alternative.

Moreover, the federal government has recognized the serious financial risks imposed on property interests by rent control. The Department of Housing and Urban Development has, through regulations, sought to protect their interests by pre-empting the entire field of rent regulation by state and local rent control boards with respect to projects which are federally subsidized and insured. Federally insured projects without federal subsidies have also been removed from the onus of local rent controls upon the government's discovery that rent control jeopardizes its economic interest.

Until this Court recognizes that the safeguards of the Fourteenth Amendment extend to owners of rental properties subject to rent control, the rental housing needs of this nation cannot be satisfied, the expansion of this nation's housing resources will be curtailed, the maintenance of existing resources will deteriorate and ultimately cease, and the highest and best use of the land will not be possible.

Few cases coming before this Court in recent years have presented an issue of greater significance to Americans. This Court's decision to hear this cause will determine the manner in which Americans will be housed for generations to come. It will determine whether real estate is a reasonable investment; whether private ownership will be forced to yield to public housing; and whether the interests of future generations in housing opportunity will be foreclosed by the interests of those who presently hold a lease.

NAR does not here presume to argue the merits of the issues presented by this cause. The views it presents are intended solely to emphasize for this Court three important factors: that the issues extend beyond the boundaries of any one state and involve the general welfare of the nation and its people; that the issues can be resolved only by this Court; and that the need for definitive resolution is immediate.

CONCLUSION.

NAR respectfully urges the Court to recognize the substantial nature of the federal questions presented and to note probable jurisdiction and fully consider this case on the merits with briefs and oral argument.

Amicus sought consent of appellants and appellees and received the consent of appellants. (See Appendix A.)

Respectfully submitted,

WILLIAM D. NORTH,
REUBEN & PROCTOR,
11 South LaSalle Street,
Chicago, Illinois 60603,
(312) 558-5565,
Attorney for the National Association of Realtors® as Amicus Curiae.

JOHN R. LINTON,
LAURENE K. JANIK.

APPENDIX.

RAVIN & KESSELHAUT
Counsellors at Law

March 9, 1979

John Linton, Esq.
National Association of Realtors
430 North Michigan Ave.
Chicago, Ill. 60611

Re: Harry B. Helmsley et al. vs.
The Borough of Fort Lee et al.
Supreme Court of the United States
Docket No. 78-1255

Dear Mr. Linton;

On behalf of the Appellants in the above docketed Appeal to the Supreme Court of the United States we consent to your filing a brief Amicus Curiae.

Very truly yours,

RAVIN & KESSELHAUT,
/s/ MARTIN KESSELHAUT,
MARTIN KESSELHAUT.

MK/tr

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1255

HARRY B. HELMSLEY, ET AL.,
Appellants,

vs.

THE BOROUGH OF FORT LEE, ET AL.,
Appellee.

AMERICANA ASSOCIATES, ET AL.,
Appellants,

vs.

THE BOROUGH OF FORT LEE, ET AL.,
Appellee.

NEW JERSEY REALTY COMPANY, ET AL.,
Appellants,

vs.

THE BOROUGH OF FORT LEE, ET AL.,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF AMICUS CURIAE NATIONAL APARTMENT ASSOCIATION IN SUPPORT OF JURISDICTIONAL STATEMENT OF APPELLANTS.

JOHN C. WILLIAMSON
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MICHAEL L. SOLOMON
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National Apartment Association
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THE CASILLAS PRESS, INC.—1717 K Street N. W.—Washington, D. C.—223-1220

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ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The National Apartment Association (hereinafter NAA) respectfully moves this Court for leave to file its brief *amicus curiae* in support of Appellants' jurisdictional statement.

The NAA is a nonprofit trade association representing developers, builders, owners, operators and managers in the apartment rental industry.

Rent control affects members of the N.A.A. throughout the nation. Presently, rent control statutes exist in over 200 communities in the following states: California, Florida, Washington, D.C., New Jersey, Massachusetts, and New York. As inflation continues, the pressures for rent control in other communities will increase.

As a national organization concerned with rental housing, we respectfully request an opportunity to file the annexed brief *amicus curiae.*

Amicus sought consent of appellants and received oral consent from Mr. Martin Kesselhaut for Appellants. However, the Appellee refused.

Respectfully yours,

JOHN C. WILLIAMSON
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MICHAEL L. SOLOMON
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Washington, D.C. 20006

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ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

BRIEF OF AMICUS CURIAE NATIONAL APARTMENT ASSOCIATION IN SUPPORT OF JURISDICTIONAL STATEMENT OF APPELLANTS

The statement of the Case as set forth in Appellants' Jurisdictional Statement is incorporated by reference.

QUESTION PRESENTED

Whether the enactment of municipal rent control ordinances by the Borough of Fort Lee, New Jersey in the absence of a national emergency is an arbitrary and unreasonable restriction of property violating the due process clause of the Fourteenth Amendment of the United States Constitution.

THE FEDERAL QUESTION IS SUBSTANTIAL

A determination of the question of whether the Fort Lee rent control ordinances, enacted in the absence of a national emergency, are an arbitrary and unreasonable restriction of property in violation of the Fourteenth amendment will affect not only the Fort Lee ordinances, but all of the rent control statutes throughout the country. Presently, over 200 municipalities have rent control statutes, and many more are being considered.

Though this Court has considered rent control valid in emergencies resulting from war, *Bowles v. Willingham*, 321 U.S. 503 (1944) and *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138 (1948), it has never considered whether rent control may be enacted in the absence of a war-related emergency.

Thus, the question before this Court is a substantial federal question never before considered by this Court.

Property may be regulated to promote the public welfare as long as the law is not unreasonable, arbitrary or capricious, and the means selected has a real and substantial relation to the object sought to be attained. *Nebbia v. New York*, 291 U.S. 502 (1934). In the instant case the New Jersey Supreme Court upheld the validity of the

Fort Lee ordinance by finding that the governing body could rationally conclude the need for rent control due to a housing shortage. However, it is a basic fact of economic law that rent control does not relieve a rental housing shortage, but further aggravates it. (See Findings and Determinations of Judge Harvey Smith, Appendix C, page 55(a) of Appellants' Jurisdictional Statement.) Consequently, in the instant case, and in all rent control cases except in a national emergency, there is no rational basis to impose rent control for the sole reason of a housing shortage.

CONCLUSION

Probable jurisdiction should be noted as the federal question presented is so substantial as to require plenary consideration with briefs on the merits and oral argument for their resolution.

Respectfully submitted,

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March 23, 1979